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THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA

BY

HAROLD SCOTT QUIGLEY

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
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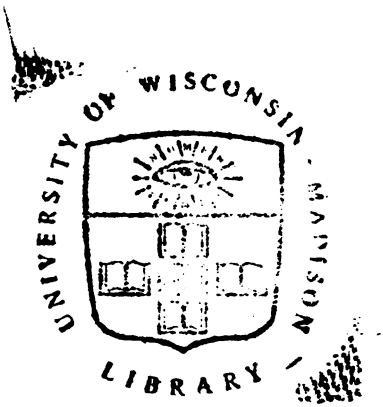
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CONTENTS

CHAPTER V.

CHAPTER VI.

INTRODUCTION

A proposal of immunity from capture at sea for all private property not subject to the law of contraband or blockade was seriously debated by a Commission of the Second Hague Conference. The proposal originated with the Government of the United States which has, from its foundation, advocated complete inviolability for commerce in time of war. Contemporary publicists have given considerable attention to the question, and various bodies, both public and private, have within recent years passed resolutions in favor of immunity. The war now in progress furnishes an unparalleled criterion of the value of existing legal limitations upon the right of capture and an index of the prospect for complete immunity.

This conjunction of circumstances favorable to an investigation of the status of private property in maritime warfare occurs at a time when no historical presentation of the subject in English exists. The treatise of Professor Charles de Boeck, *De la propriété privée ennemie sous pavillon ennemi,* published at Paris in 1882, is an exhaustive exposition of the material available up to that date. The rarity of this scholarly work as well as the valuable store of fact and opinion which it contains have appeared to justify a considerable number of references to it. The majority of writers, however, tend to treat the subject either theoretically or from the viewpoint of the present advantage of immunity to a particular country. Both methods of approach lack the essential background of history. Considerations of theory, history and policy all enter into any sound conclusions upon the present question.

Immunity means the freedom of enemy ships and of enemy goods on board from liability to confiscation. The significance of the problem which is involved in the effort to establish im-

munity in international law becomes clearer after examination of the stages through which the right of capture has passed from the time when limitations upon it began to be introduced. Practice under the existing rules calculated to protect neutral ships, neutral goods and enemy goods on neutral ships affords reliable guidance to those who would determine the value of proposed rules to protect enemy ships and their enemy cargoes.

The writer's principal aim is to explain the tendencies of both the practice and theory of the law of private property in war at sea: to determine how far belligerent states observe the law and how far the exponents of immunity are warranted in anticipating an accomplishment of the reform they desire. It goes without saying that the material for a proper treatment of the present war on commerce is as yet unavailable. The main lines of the systems devised by the Allied and by the Central Powers for the *control* of enemy trade were discernible by July, 1915, and they are presented as developed up to that time. But the conclusions reached rest upon an investigation of practice since 1856.

The phrase, "Freedom of the Seas", has borne different meanings in different periods. Today its meaning varies with the country in which it is discussed. The treatment of private property is a necessary element in any conception of the phrase, and the importance of any endeavor to give unbiased, non-propagandist consideration to this vital subject is manifest.

THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA

CHAPTER I

THE EARLY HISTORY OF THE LAW OF CAPTURE

"Dans l'antiquité, les règles de la guerre sur mer sont d'une simplicité élémentaire; la force regne seule . . . rien ne met obstacle au déchaînement des passions et à la violence de leurs manifestations."[1] Previous to the fourteenth century, regulations of maritime warfare were few and scattered. The *Tables of Amalphi,* compiled about the sixth century A. D., are regarded by certain authorities as the first attempt at a code of maritime law.[2] The *Rooles d'Oleron,* dating from the thirteenth century, did not deal with the usages of war at sea.[3] Not until the latter part of the next century did there appear at Barcelona the famous compilation known as the *Consolato del Mare,* upon which any study of the customs and laws of maritime war must depend for its references to origins.[4] Containing provisions derived from Greek and Roman law, from French, Spanish, Syrian, Venetian, and Genoese practice, and from observances of the island states of the Mediterranean, the *Consolato* was accorded a general recognition amongst the commercial powers.

[1] Nys, Ernest, "Une page de l'histoire de la mer" in *Revue de droit international,* 2e série, T. II, 1900, p. 62.

[2] Verraes, F., *Les lois de la guerre et la neutralité* (Brussels, 1906), I. The laws of the Rhodians dating from the second century A. D. contain no mention of the rules of capture.

[3] Twiss, Travers, *Law of Nations* (Oxford, 1863), II, p. 146.

[4] Although not drawn up in the form known today until the fourteenth century, it was the expression of usages dating back several centuries Different authorities date the *Consolato* as early as the twelfth century.

It left to the "common sense" of the commanders of public ships the proper course to pursue when an enemy ship with an enemy cargo on board was encountered.[5] On the other hand, while enemy property on neutral ships was subject to capture, the neutral shipmaster was to recover his freight, and only in case he refused to convey the enemy cargo to a designated place of safety might the captor sink the vessel. Conversely, neutral goods on board an enemy vessel were free from capture. This conclusion is drawn from the following stipulation of Chapter CCXXXI:

"And if by chance the said ship or vessel be enemy's property, and the cargo on board the said ship or vessel be the property of friends, the merchants who shall be on board the said ship or vessel and to whom the cargo shall belong either in whole or in part, ought to come to an arrangement in respect of the said ship, which is good prize of war, with the said admiral . . . ."[6]

The same chapter further stipulates for damages to the merchants in case they, being willing to agree, lose their cargo by reason of its being "sent away" by the captor.[7]

The *Consolato del Mare* remained until the middle nineteenth century the common law of the Mediterranean, and extended its influence into the Atlantic. Being expressed as general rules, it is to be expected that states will have, by mutual agreement, provided special rules for special circumstances. It will be found also that such special rules have come into so frequent use at different periods as to have taken upon themselves the appearance of general customs and to have been set up by states, in whose interest such action was, as rules of more general and binding force than the rules of the *Consolato*. The most useful guide to a safe conclusion upon the question of the law of capture at sea prior to the Declaration of Paris is the study of the attitudes taken by the greater maritime powers, as shown by their treaties, by their practices in war, and by the opinions of publicists. To arrive at a clear comprehension of the gradual development of moderating elements leading up to the rules

[5] Twiss, Travers, *The Black Book of the Admiralty* (London, 1874), III, pp. 539–547.

[6] Twiss, *The Black Book of the Admiralty*, III, pp. 539–547.

[7] *Ibid.*, p. 545.

proclaimed in 1856 it will be advisable to consider each state separately. And although governmental action and the opinions of the various sorts of private interests and authorities react upon one another and progress together, there will be greater certainty as to what is law and what is theory at any given period in any given state if the two are treated separately. That the questions of neutral property and enemy property are closely intermingled, the former sometimes protecting the latter, the latter at other times incriminating the former, necessitating their being studied concurrently, will appear as the discussion proceeds.

I. English Practice Previous to 1854

So consistently has England in modern times upheld the rules of the *Consolato del Mare,* recognizing the justice of exempting from the effects of war the goods of those "qui in bello medii sunt", while refusing to relieve private enemy individuals of any of the harsh consequences of the struggle, as to have fixed upon the *Consolato* the name of the "English Rule". It is difficult, however, to accept the assertion of Manning, when, after a survey of the English treaties prior to 1600, he declares that they are all uniformly "in support of the *Consolato del Mare.*"[8] The statement of Westlake—that "it is more likely that the currency of that document embraced the Atlantic as well as the Mediterranean ports of the Spanish peninsula, and that these obtained the adoption of their system in their treaties with England, than that the latter country spontaneously took up for a few years a line to which neither its earlier nor its later manifestations during the middle ages point"[9]—more nearly follows the records of the agreements during the mediaeval period. Only two treaties, that of 1351 with Biscaye and Castile,[10] and that of 1353 with certain Portuguese cities,[11] provide for freedom of neutral goods from capture on enemy ships. The treaties which contain agreements to refrain from the transportation

[8] Manning, *Law of Nations,* edited by Sheldon, Amos, (London, 1875), p. 315.

[9] Westlake, John, *International Law* (Cambridge, 1907), II, pp. 123–125.

[10] Rymer, *Foedera* (The Hague, 1741), III, 1, p. 71.

[11] *Ibid.,* p. 88.

of enemy goods are numerous. England observed with unflagging consistency the rule of capture of enemy goods wherever found, whence the necessity and the value of such treaties as that of 1406 between Henry IV of England and the Duke of Burgundy, in that period Count of Flanders.[12] This agreement was modelled upon that of 1370 by which, in order to guard against the necessity of submission to search, the Duchy of Flanders agreed that its subjects should be forbidden to carry the goods of England's enemies and England agreed to receive Flemish passports, certifying to the innocent cargo of Flemish merchant vessels.[13] In 1373 the English king applied the principle of the freedom from capture of neutral vessels by returning to Portuguese owners a vessel which had been found to be carrying enemy property.[14]

The Anglo-Burgundian treaty of 1406 was renewed in 1417 with the addition of a new clause.[15] England, then at war with Genoa, would confiscate Flemish goods (neutral) found on Genoese vessels. This rule will appear later in company with that rendering all goods free on neutral vessels. In the treaty here mentioned it is directed only against neutral goods on Genoese vessels, and it necessarily lost all force upon the close of the war with Genoa. The treaty of 1406 was renewed in 1446,[16] 1467,[17] 1478,[18] and 1495[19] without mention of such a clause as that added in 1417. In 1461, however, an English statute made neutral property on enemy ships good prize,[20] and in 1468 a treaty with Brittany, renewed in 1486, permitted confiscation of all goods found upon enemy prizes.[21] The treaty clauses provide first that no goods of English or Breton merchants ta-

[12] *Ibid.*, IV, 1, p. 3: "les Marchans, Maistres des Niefs et Maronniers de dit Pails de Flandres, ou demourans en Flandres, ne amesront pur fraude ne coleur quelconque, aucune Biens ou Merchandises des Ennemis des Englis par Mer."

[13] Rymer, *Foedera*, III, 2, p. 172.

[14] *Ibid.*, 3, p. 4.

[15] *Ibid.*, IV, 3, pp. 13, 30.

[16] *Ibid.*, V, 1, p. 165.

[17] *Ibid.*, 2, p. 151.

[18] *Ibid.*, 3, p. 88.

[19] *Ibid.*, 4, p. 85.

[20] 20 Henry VI (1461–2), cited by Westlake, II, p. 124.

[21] Rymer, V, 2, p. 161; Renewal, V, 3, 178.

ken as prizes on sea or river and brought into the ports or harbors of either country should be sold or alienated; secondly, that such property coming from either country and going to a country not hostile to either should not be stopped nor disturbed in the ships of any country; thirdly, that the merchants of neither country should transport the goods of the other's enemies: Then occurs the following article:

"Et, par ce qui dit est par ce present Traietie, n'est pas Entendu, que, si les Gens du Paiis de Bretaigne mettoient leurs Parsones, Biens, ou Marchandisez en Navires de Partie d'Ennemiez de Nous & de Nous Paiis & Royaume d'Angleterre, non aians saufconduit de nous ne esteans en Truez ou Abstinans de Guerre avesquez Nous, Que lez Gens du dit Partie d'Angleterre ne puissent prander & acquirer a eulx les Parsonnez et Biens, qu'ilz prandrerount dedans le Navires Ennemicez de Party de Nous & de nostre dit Paiis & Royaume d'Angleterre; & aussi pourrount les Gens du Party de Bretaigne prandre & acquirer a eulx les Parsonnes & Biens du Partye d'Angleterre, qu'ilz troverount en Naviers Ennemicez du dit Paiis & Duchie de Bretaigne, non ayans saufconduit *du dit Duc*, ne esteans en Treus ou Abstinans de Guerre ovesquez Luy, ainssi qu'il est dit de ceulx de Party d Angleterre; mais les Gens de chescune Party purrount Mener & Remener par Meer & par Terre, Rivers, & Eaus doulces, les unez d'eulx en Party de l'autre, & chescune d'eulx en son Party, lez Biens de Gens qui ne serront Ennemicez de l'autre Partie, sans ce qu'ilz en soient Empeches, ne que lez Gens d'une Party leur y portent Dammage en ascune manier."

Peillon appears to err in two respects regarding this treaty, in ascribing it to 1463, for which year there occurs in Rymer's collection no account of any Anglo-Breton treaty, and in asserting that it marks a backward step in that it makes neutral property aboard an enemy ship good prize.[22] The *pas en arrière* had, as has been shown, been taken much earlier.

During the next century the English practice varied. In 1545 an "absolutory" decree was handed down from the High Court of Admiralty, confiscating a cargo of neutral property which consisted of cloth and other non-contraband articles ta-

[22] Peillon, E., *La Propriété privée ennemie* (Paris, 1910), p. 27. His comment upon the treaty does not indicate an entirely unprejudiced viewpoint: "L'Angleterre, qui prévoit déjà ses destinées maritimes, invente le principe nefaste qui corrompra le droit de toute la periode suivante et laissera des traces jusqu'au XIXe siècle: Navire Ennemi confisque robe d'ami".

ken on board a vessel proceeding from Bordeaux to Rouen.[23] In 1557 an Order in Council made, as against France, neutral property on enemy ships good prize and added the still more retrograde rule confiscating neutral ships for the carriage of enemy goods. The observance of this Order had ceased before the end of the century, as in the case "S. D. N. R. c. prize goods of the Lyon's Whelp", Spanish goods being enemy were condemned to the Crown but the neutral French carrier was released.[24] Gradually also the rule against neutral property on enemy ships was relaxed until in the early seventeenth century the *Consolato* had become the general source for the Court of Admiralty. As late as 1602, however, an English decision condemned the property of neutral Venetians captured with a Portuguese vessel;[25] thus by treaty and practice prior to the seventeenth century, English leanings were rather away from than toward the *Consolato* principle of freedom to neutral goods wherever found.[26]

Boeck comes to the conclusion that during the fourteenth and fifteenth centuries the rules of the *Consolato* were generally

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[23] Insano c. Elsdon, *Select Pleas in the Court of Admiralty*, Vol. I, No. 66: Selden Society Publications, Vol. VI, pp. 138, 235; *Select Pleas*, Vol. II, No. 66, Selden Society Publications, Vol. XI, p. lxvi. Mr. Reginald G. Marsden, the editor of Volumes VI and XI of the Selden Society Publications, in which the cases are collected for the years 1390–1404, 1527–1545 and 1547–1602, suggests the possibility that the statute of 1461 had been revived in retaliation for the French rules and practice. This suggestion is strengthened by the English Order of 1557, noted by Westlake, p. 126, which provided that as against Frenchmen enemy ships should confiscate neutral goods on board and enemy goods neutral ships in which they were being carried. This according to the Order was due to the fact that France "put the same in execution against the subjects of this realm".

[24] *Select Pleas*, II, No. 215, Selden Society Publ., XI, p. lxxiv.

[25] *Select Pleas*, II, No. 155, Selden Society Publ., XI, p. lxxv.

[26] "There are many other indications that the reign of international law was beginning (after 1625); the practice of other nations in matters of prize is constantly referred to, and the judge, Sir Henry Marten, is found protesting against being called upon by the Admiral or the Council to condemn as prize ships and goods which in his judgment ought to be restored." Marsden, R. G., in *Records of the Admiralty Court*, R. H. S., New Series, XVI, p. 79. In contrast to this development were the Orders in Council of 1625 and 1626, which rendered subject to condemnation neutral ships carrying contraband, though not captured until on their return journey. And in 1689 England and Holland combined to interdict all commerce with France. Dumont, Jean. *Corps universal diplomatique du droit des gens* (Amsterdam, 1726–31), VII, 2, p. 238.

followed by the countries of Western Europe. He is unable, however, to cite any treaties other than those of 1351 and 1353 above mentioned which in specific terms grant immunity to neutral property on enemy ships. Like other writers, he appears to consider the consistent English practice of capturing enemy goods wherever found as sufficient evidence of the observance of the *Consolato,* whereas the fate of neutral property is the more important from the point of view of progress. And while in a more advanced period, treaties are to be regarded not as embodying international law but as creating exceptions to it, in an earlier stage of legal development, we are apt to find such law as exists at all embodied in treaties. If this view be correct, the comparatively large number of treaties which either made no mention of the treatment to be accorded neutral property in enemy ships or provided expressly for its liability to confiscation form a body of evidence against the generally accepted view.

Boeck accepts the statement of Ward in *A Treatise on Relative Rights and Duties* that in seven commercial treaties of the sixteenth century England did "not derogate from" the *Consolato* rules. To this we have to oppose the facts of English practice in that century noted by Westlake. We have also the statement of Manning (pp. 314–315) that in no commercial treaties between 1495 and 1604 was the subject of capture mentioned. Ward evidently considered no mention equivalent to upholding the *Consolato.* But this is contradicted by Westlake's *exposé* of the practice of the sixteenth century.[27]

It is generally held that from the early part of the seventeenth century, in the absence of treaty clauses to the contrary, the English Court of Admiralty applied the rules of the *Consolato.* The influence of the Dutch, exerted toward and hastening that development, was to go further and lead to treaties by which England in exchange for the right to capture neutral goods on enemy vessels, gave up the right to capture enemy

[27] de Boeck, Charles, *De la propriété privée ennemie* (Paris, 1882), pp. 32–34.

goods, not contraband, on neutral vessels. Her first treaty containing such stipulations was signed with Portugal in 1654.[28]

In 1667 a similar agreement was made with Holland.[29] The provisions, as found identically in the treaty between England and Spain of the same year, were:

XXI. "The Subjects and Inhabitants of the Kingdoms and Dominions of the Most Serene Kings of Great Britain and Spain respectively, shall with all security and liberty, sail to and traffic in all the Kingdoms, Estates, or Countries, which are or shall be in Peace, Amity, or Neutrality, with the one or the other.

XXII. And they shall not be disturbed or disquieted in that liberty by the Ships or Subjects of the said Kings respectively, by reason of the hostilities which are or may be hereafter between either of the said Kings and the aforesaid Kingdoms, Countries, and States, or any of them which shall be in friendship or neutrality with the other.

XXIII. And in case that within the said Ships respectively be found by the abovesaid means, any merchandise hereunder mentioned, being of contraband and prohibited, they shall be taken out and confiscated, before the Admiralty or Other Competent judges; but for this reason the Ship, and the other free and allowed commodities which shall be found therein, shall in no wise be either seized or confiscated.

XXIV. It is also agreed, that whatsoever shall be found laden by the Subjects or Inhabitants of the Kingdom and Dominions of either of the said kings of England and Spain aboard the Ships of the Enemies of the other, though it be not forbidden merchandise, shall be confiscated, with all things else which shall be found within the said Ships, without exception or reserve."[30]

It is asserted by Mr. L. A. A. Jones that from that date until 1796 in but one (that of 1670) of thirteen treaties signed between England and Spain were the new rules lacking. The same writer considered that these rules were still in force between Great Britain and Spain in 1907 in view of the failure of Spain to accede to the Declaration of Paris. His conclusion was invalidated only in 1908 when Spain announced her accession to the Declaration.[31]

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[28] *British and Foreign State Papers*, I, p. 488.

[29] Dumont, VII, 1, p. 49.

[30] *British and Foreign State Papers*, I, pp. 572–573.

[31] Jones, L. A. A., *Commerce in War* (London, 1907), p. 296. It may be noted in support of Mr. Jones' statement that although Spain and France made peace in 1795, it was not until August of 1796 that they entered into a treaty of alliance. Hence the following provision of the treaty of 1814

In eight treaties with France and in five with the United Provinces, all prior to the nineteenth century, England agreed to the Dutch principles. The most famous of these treaties was that of Utrecht.[32]

On the other hand, in English treaties with weaker states such as Denmark, Brandenburg, Sweden, and Savoy, the rules of the *Consolato* were either expressly stipulated, or, by the express exclusion of the new rules, the old rules were left in force.[33] During the war with France which began in 1744 English courts had condemned the goods of French enemies on board neutral Prussian vessels. In the subsequent Silesian Loan Controversy, in which for the first time the claim to legal immunity for enemy property in friends' vessels was advanced (by the Prussian government), the British memorialists maintained as an undoubted principle of the law of nations, the right to capture the goods of an enemy wherever found, in the absence of a treaty specifying a different procedure.[34]

In the Seven Years War England had to deal with a neutral with whom she had treaties providing for the new principles.

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between Great Britain and Spain: "It is agreed that, pending the negotiation of a new Treaty of Commerce, Great Britain shall be admitted to trade with Spain upon the same conditions as those which existed previously to 1796. All the Treaties of Commerce which at that period subsisted between the 2 nations being hereby ratified and confirmed". (British State Papers, 1, p. 292.) Manning was therefore in error in affirming (p. 348) that none "of the treaties by which Great Britain had formerly engaged herself to maintain the principle that 'free ships make free goods' [was] renewed at the general peace". Westlake also overlooked the 1814 treaty with Spain since he states (p. 128) that "the last occasion on which [England renewed her stipulations of Utrecht] was that of her commercial treaty with France in 1786".

[32] Dumont, VIII, I, pp. 348, 349, 379, 380.

[33] For collected treaties with brief comments see Manning, pp. 312–351.

[34] For complete treatment of this question, see Marten's *Causes célèbres du droit des gens,* II. Cause première; also Satow, Sir E., *The Silesian Loan and Frederick the Great* (London, 1915). The British reply to the Prussian memorial may be found in *State Papers,* XX, pp. 889–907. On p. 889 the law of the case is stated thus: "When two Powers are at war they have a right to make Prizes of the Ships, Goods, and Effects of each other upon the High Seas. Whatever is the property of the Enemy may be acquired by capture at Sea; but the property of a Friend cannot be taken, provided he observes his Neutrality." On p. 892: "Particular Treaties too have inverted the rule of the Law of Nations and by agreement declared the goods of a Friend, on board the ship of an Enemy to be Prize; and the goods of an Enemy on board the Ship of a Friend, to be free, as appears from the Treaties already mentioned and many others."

France, weaker upon the sea than her rival, authorized the ships of Holland to carry her colonial products for her. As Boeck says: "La politique commerciale du XVIIIe siècle reposait sur le monopole colonial."[35] By imposing upon this trade the rule that trade closed to a country's merchant marine in time of peace was illegitimate in time of war, England "beat the devil around the bush" in the face of Anglo-Dutch treaties, and enforced, instead, the ancient *Consolato* rules.

The British contention which evoked the Armed Neutrality of 1780 was the same as that declared by Lord Mansfield and his fellow-memorialists in 1753. The continental Powers, among other articles of their manifesto, affirmed: "That the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband."[36] No counter proposal such as had been customary in treaties, permitting confiscation of neutral goods in enemy ships, and thus making the flag cover the cargo whether enemy or neutral, was made. The Neutrality Powers were not inclined to withdraw from the higher standard set by the *Consolato* and observed by England. The British replies to Denmark and Sweden noted the existence of treaties with both those powers providing expressly for the observance of the old principles.[37] To Russia, the British Cabinet declared that

> "his Majesty hath acted towards friendly and neutral powers according to their own procedure respecting Great Britain, and conformably to the clearest principles generally acknowledged as the Laws of Nations, being the only law between powers where no treaties subsist, . . . that precise orders had been given respecting the flag and commerce of Russia, according to the Laws of Nations and the tenor of our treaty of commerce."[38]

With Holland there existed a treaty containing the new rules. By declaring war against her before she could accede to the Neutrality, Great Britain placed the United Provinces as well as France outside the circle of neutral countries, with whom

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[35] Boeck, p. 53.

[36] Martens, *Rec.* III, Art. 2, p. 159.

[37] Martens, *Rec.* III, pp. 182–183; 188–189.

[38] *Ibid.*, pp. 160–161. Manning mentions the treaty of 1734 with Russia, stipulating the old rules. Dumont, *Supp.* (Amsterdam, 1739), II, 2, p. 495.

alone, as Westlake points out, such treaties can be operative.[39] With Prussia and the Two Sicilies the nonexistence of treaties covering the question left simply the common law of the *Consolato* between them and Great Britain. From the English point of view the law of the controversy, both customary and as expressed by treaty, was clear. Whether England was justified in regarding the *Consolato* as the common law of the sea will appear after a consideration of Continental treaties and practice.[40]

Between the first and the second Armed Neutralities, Great Britain ratified two important treaties containing the principle that the flag covers the cargo, those of 1783[41] and of 1786,[42] both with France, the latter being the last treaty in which she stipulated for that principle.

The Armed Neutrality of 1800, induced by other related causes, included in the body of principles promulgated, the second rule of the manifesto of 1780,—free ships, free goods.[43] At this time England was better prepared to maintain her own doctrine, and the combined influences of the battle of Copenhagen and of the change of sovereigns in Russia led to the Russo-British treaty of June 5–17, 1801, to which Denmark and Sweden later acceded.[44] By it the rule of the *Consolato* permitting confiscation of enemy goods in neutral ships was upheld. England, constrained by political expediency, first to make engagements to respect neutral property in enemy ships, later to grant immunity by conventional agreement to enemy property

[39] Westlake, p. 128. Such a treaty always regards the co-contractants as being in the relation of belligerent and neutral. They agree, in case one party gets into war, to permit the other party, being neutral, to transport enemy goods not contraband without liability to capture and on the other hand it is provided that the goods of either being neutral, will be capturable on enemy ships. Thus the practice of England in the wars of the period in which she had such treaties, approximately between 1650 and 1785, was to apply the rules of the *Consolato*, although she had treaties specifying the Dutch rules with the more important maritime powers.

[40] Peillon says: "La Grand-Bretagne dut acquiescer au principe qui avait coalisé contre elle toute l'Europe." (p. 34.) The general opinion of writers is quite to the contrary. Manning says: "Our government never once acceded to the principles therein put forward . . . " p. 337.

[41] Martens, *Rec.* III, p. 521.

[42] *Ibid.*, IV, pp. 168, 172.

[43] *Ibid.*, VII, p. 176, Art. 2.

[44] *Ibid.*, VII, pp. 260–281. (For the three treaties.)

in neutral ships, did not revert to her early policy of indiscriminate capture of all goods found on enemy ships, but, having won assured maritime predominance, used her power to force consent to the rule of the *Consolato* respecting enemy property. She was justified in that course by the readiness with which Russia in 1793 agreed with her to return to the old rule of capture with exemption of neutral property. Contemporaneously Great Britain entered into the treaties of 1793 with Russia,[45] Spain,[46] the German Emperor,[47] and Prussia,[48] by which neutrals were to be prevented "from giving, on this occasion of common concern to every civilized state, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea or in the ports of France." In conformity with these agreements and with the British desire to control the trade of her enemy, to restrict his imports, and to maintain the carrying trade of her own merchants, the Orders in Council passed during the first war anticipated practically all the measures adopted during the second war with France. England entered the war unhampered by any treaty engagements to observe the principles which had been endorsed by numerous treaties of the previous hundred years. She was upon safe ground, therefore, in condemning enemy goods on neutral ships. She went further, however, extending her contraband list to include corn, flour, and meat, and condemning as good prize all ships which were captured conveying provisions to the French colonies or their products from them. English practice varied between the condemnation of neutral ships and the neutral cargo on board and the exercise of the right of preëmption.[49] Danish commerce was nearly wiped out. The strictures upon American trade led to war talk in the United States, but instead the Jay Treaty contained the very rules which Great Britain had been upholding as the law of nations, the only treaty ever signed by the

[45] Martens, *Rec.* V, pp. 440–442.
[46] *Ibid.*, p. 477.
[47] *Ibid.*, p. 488.
[48] *Ibid.*, p. 485.
[49] Fish, C. R., *American Diplomacy* (New York, 1915), pp. 108–114.

United States which agreed to those principles.[50] The United States did not like the treaty but preferred its terms to war. It placed the United States in a position which France could and did attack as unneutral.

In 1797 Great Britain and Russia signed a treaty of commerce which made no change in the old rules.[51] The treaty of 1801 between these two powers has already been mentioned. Boeck draws attention to a special clause exempting from the fate of enemy goods: "les marchandises du produit du cru ou de la manufacture du pays en guerre, qui auraient été acquisés des sujets de la puissance neutre et seraient transportées pour leur compte."[52]

The utter disregard for neutral rights which marked the years succeeding the rupture of the Peace of Amiens found expression in British practice as in that of her enemies. The British measures adopted to combat the "Continental System," like that "System" itself were based upon blockade, with which, *per se,* this study is not concerned. Great Britain continued to hold to and act upon the ancient principles of capture at sea until the War of the Crimea.

II. French and Spanish Practice Previous to 1854

Prior to the seventeenth century, with the exception of the Anglo-Spanish treaty of 1351, the evidence of treaties as to French and Spanish observance of rules of maritime law is lacking. The ordinances of France, whose principles were followed in Spain, provide an adequate substitute. By the first of these Ordinances, that of 1533, the rules of the *Consolato,* hitherto observed, were modified to the extent that neutral property was made capturable in enemy vessels. To this was added in 1543 the still harsher rule that the neutral ship, carrier of enemy goods, was good prize. "Ainsi," says Boeck, "le pavillon confisque la cargaison, et la robe de l'ennemi confisque la robe de

[50] Martens, *Rec.* V, pp. 672–674.
[51] *Ibid.,* VI, p. 362.
[52] Boeck, p. 77.

l'ami et le navire."[53] His conclusion on the latter point he bases upon a study of the ordinance of 1584,[54] which repeats the rules of 1543, differing from Valin and Cleirac, who interpreted the ordinances of 1543 and 1584 to mean that the goods only were confiscated, the neutral ship being released.[55] He regards the decree of the Parlement in 1592 releasing a Hamburg merchant vessel captured with an enemy cargo aboard as simply an exception. The general rule under the decrees was that of hostile infection—enemy ship, enemy goods; enemy goods, enemy ship.

By the next important ordinance, that of 1650, neutral ships were released from liability for carrying enemy property.[56] Neutral property in enemy ships also was made immune. Thus the practice of the *Consolato* was revived.

The ordinance of 1681 returned to the principle of hostile infection, which Valin asserts to have been confined to France and Spain and which is by some authors denominated the "French System."[57] The rigor with which this ordinance was applied is illustrated by an edict of 1705 according to which, if a privateer made a capture which was found to be unjustified, the neutral owner nevertheless should stand the costs of the action.[58]

The conventional agreements of France during the seventeenth century, like those of England, show the influence of the new ideas of neutral rights. By a treaty of 1604 France obtained from Turkey the promise that she would not confiscate goods of her enemies found on French vessels—a unilateral application of the free ships, free goods rule.[59] In 1650 Spain and the United Provinces agreed to observe reciprocally that

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[53] Boeck, p. 37. He adds in a note on the same page that according to Cleirac (*Us et coutumes de la mer*, Bordeaux, 1647, p. 406) the word "robe" was applied by merchants of Provence, Catalonia, and Italy to goods of all kinds.

[54] Clauses in point quoted by Boeck, pp. 37–38.

[55] Comments quoted by Boeck, p. 39.

[56] Valin, *Ord. de la marine*, III, 9; Art. I, cited by Manning, p. 323, and note 4.

[57] *Ibid.*, Art. VII: "Tous navires qui se trouveront chargés d'effets appartenant à nôs ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi, seront pareillement de bonne prise." Quoted by Boeck, p. 46.

[58] Boeck, p. 46.

[59] Dumont, V. 2, p. 40.

rule with its accompanying enemy ships, enemy goods.[60] In 1646[61] France in a treaty with Holland agreed to a provision to which the Dutch with good reason attached the significance of "free ships, free goods," but which France interpreted simply as conferring immunity upon neutral ships carrying enemy goods, not contraband. In 1655 France incorporated practically identical provisions in a treaty with the Hansa towns, with the additional article that goods of Hansa subjects found aboard enemy ships should be restored to them.[62] In 1667 Spain and England agreed to permit the flag to cover the cargo.[63] Between France and Spain the new rules were agreed to in the Treaties of the Pyrenees of 1659[64] and of Aix-la-Chapelle of 1668.[65] Obviously, the seventeenth and eighteenth centuries were the great period of struggle between contending principles, the more liberal encroaching gradually but surely and appearing contemporaneously in the treaties of the same power alongside other treaties containing rules of a more severe character. Even the general agreement upon the new principles in the various treaties of Utrecht[66] did not antiquate the tendency to make

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[60] *Ibid.*, VI, 1, p. 571.

Article XIII. "A été en outre accordè & convenu, que tout ce qui se treuvera chargé par lesdits Subjects & Habitants des Provinces-Unies en un Navire des Ennemis dudit Seigneur Roy, jaçoit ce ne fust Marchandise de Contrebande, sera confisqué avec tout ce qui se treuvera audit Navire sans exception ni reserve."

Article XIV. "Mais d'ailleurs aussi sera libre & affranchi, tout ce qui sera dans les Navires, appartenants aux Subjects desdits Seigneurs Estats, encore que la charge, ou partie d'icelle fût aux Ennemis dudit Seigneur Roy, sauf les Marchandises de Contrebande, au reguard desquelles on se reglera selon ce qui a été disposé aux Articles precedents."

[61] Discussed in Manning, pp. 316–317.

[62] Dumont, VI, 2, p. 103. This treaty, however, Boeck (p. 41) accepts as "formulating in explicit terms les deux principes: Vaisseaux libres, marchandises libres, et, pavillon ennemi ne confisque pas marchandise amie." If he is correct, this treaty incorporates the principles introduced into the Declaration of Paris.

[63] Dumont, VII, I, p. 27.

[64] *Ibid.*, VI, 2, p. 267.

[65] *Ibid.*, VII, I, p. 90.

[66] Dumont, *France and England*, VIII, 1, pp. 348–349; *France and Holland*, VIII, 1, pp. 379–380; *Spain and England*, p. 409; *Spain and Holland*, p. 431.

Boeck states in note on p. 49 that the Anglo-Spanish treaties of peace and of commerce do not "speak of the fate of enemy property under neutral flag, nor of that of neutral property under enemy flag." This statement is not in accord with those of other writers. Article I of the *"Treaty of Navigation and Commerce between Great Britain and Spain"*, signed at

treaty rules to fit peculiar circumstances, the history of agreements continuing to show anything but uniformity. The majority of the treaties during the eighteenth century, however, as previously noted, incorporate the principle that the flag covers the merchandise. Boeck states that Holland, Sweden, Denmark, France, Prussia, and Spain faithfully observed the principle in their mutual relations; that the French ordinance of 1744 was not enforced against Denmark, Sweden, or Spain; that on this account also Spain respected enemy merchandise on board Dutch and French vessels; and that only because Great Britain was confiscating the goods of Spanish merchants aboard French and Dutch vessels did Spain retaliate with an ordinance of 1741 decreeing confiscation of English cargoes on board the same vessels.[67]

The French ordinance of 1744 stood to that of 1681 as had the ordinance of 1650 to that of 1594, commanding the prize courts to condemn enemy goods but to release the neutral ships which carried them.[68] In July, 1778, a new ordinance made neutral carriers of contraband confiscable only if the cargo were two-thirds contraband.[69] In 1780 Spain issued an ordinance to place the French practice on a legal basis in Spain.

The record of fact gives to France and Spain small ground to stand upon in justifying their association with the Armed Neutrality of 1780. It did, however, evidence a gradual advance through several centuries, and the ordinance of 1778 did contain the major principle for which the league of neutrals stood. For France to maintain in 1780 that that principle rather than any other was a part of the law of nations was, it would appear, to admit that her long series of ordinances had all been contrary to international law. Her reason for acquiescing in the principle was selfish; on the other hand, the close con-

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Utrecht, December 9, 1713, ratifies and confirms the Treaty with Spain of May 13–23, 1667, inserting it word for word. Articles XXIII and XXVI of that treaty contain the new rules. *British State Papers*, I, p. 615.

[67] Boeck, pp. 50–51.

[68] For additional stipulations upon the determination of ownership see Boeck, p. 51. Ordinance printed by Valin, II, p. 253.

[69] Martens, *Rec.* III, 122. This ordinance is usually regarded as embodying the rule of free ships, free goods. Boeck states the necessary proportion of contraband as three-fourths, p. 59.

tact with neutral grievances could not but demonstrate to one of the greatest belligerents the unmistakable tendency toward greater freedom for commerce in time of war. The conventional agreements of the Treaty of Utrecht were renewed at the Peace of Paris in 1783. Treaties of France with Holland,[70] Great Britain,[71] Russia,[72] and Hamburg[73] marked the next ten years, evidencing the continuance of the sentiment for enlarged commercial freedom.

Leaving for a later chapter the legislative discussion of 1792, the record of French law and practice takes on in 1793 a tinge analogous to that already noted on the other side of the Channel. In that year the political paths of France and Spain divide, but their practice remains similar. With both of these states the United States had treaties specifying that "free ships" should make "free goods." Spain confirmed the provision in 1795,[74] France not until 1800.[75] During the years preceding the treaty of Morfontaine France was forced to adopt a policy of retaliation against the British policy of control of trade. For her to have permitted enemy goods to be free in neutral vessels while Great Britain pursued a general policy of capture would have been too great a sacrifice. Accordingly she passed in 1793 ordinances which had the effect of legalizing the capture of enemy goods in any vessel and the preëmption of provisions in neutral vessels, to whatever person they belonged.[76] Thus by both sides the neutral carrying trade and neutral agricultural products were placed under the ban. The Jay Treaty was followed by a decree placing all neutrals under liability to the same treatment as Great Britain was able to exercise over them. The proofs required of neutral ownership were made more stringent. Finally, the old French rule of

[70] Martens, IV, p. 68.
[71] *Ibid.*, pp. 168, 172.
[72] *Ibid.*, p. 210.
[73] *Ibid.*, p. 426.
[74] Martens, VI, p. 154.
[75] *Ibid.*, VII, p. 103.
[76] For a concise account of the practice during these years see Boeck, pp. 69–76.

hostile infection was revived.[77] And the operation of this rule was made even more oppressive by an arbitrary listing of numerous articles as of English make which were actually the product of other countries.

The interest and inclination of France were, however, in the other direction. She tried in vain at the Peace of Amiens to obtain new regulations for war at sea. Trafalgar had not yet definitely assured British maritime supremacy, but England was able to hold back the progress of neutral rights for another half-century. Her representative at the Congress of Vienna was instructed not to discuss the rules of capture.

France in her treaties of the next forty years maintained always the principle under which the flag covered the cargo.[78] In 1823, on the occasion of sending an armed expedition into Spain, she gained for herself the honor of being the first great power to respect private enemy property upon enemy ships. In the despatches of Chateaubriand, Minister of Foreign Affairs, sent April 17, 1823, to French foreign representatives, occurs this promise:

"La marine royale ne prendra que les bâtiments de guerre espagnols; elle n'arrêtera les bâtiments marchands espagnols ou étrangers que dans le cas où ils tenteraient de s'introduire dans une place reéllement bloquée par les forces navales du Roi et chercheraient ainsi à forcer un blocus effectif."[79]

Opinions are divided as to the merit of this action. France lost but little by renouncing the right of capture and gained greater respect for her enterprise. The intervention against the Spanish revolution was not favored by England and America.

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[77] Guichard, *Code des prises*, II, p. xli, quoted by Boeck, p. 73. "L'état des navires, en ce qui concerne leur qualité de neutre ou d'ennemi, sera déterminé par leur cargaison; en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre ou de ses possessions, sera declaré de bonne prise, quel que soit le propriétaire de ces denrées ou marchandises."

[78] Boeck states, p. 101, that the treaty of 1842 between Great Britain and Portugal was the only treaty of the nineteenth century which denied the inviolability of the neutral flag. The 11th clause of the treaty contains the rules of the *Consolato*. State Papers XXX, p. 378. Boeck's statement, however, overlooks the British convention of 1801 with Russia.

[79] Boeck, p. 96.

III. The Practice of Holland Previous to 1854

The Netherlands, in common with general European usage, took as the basis of maritime law the *Consolato del Mare*. The principles of that compilation found expression in a treaty with Scotland in 1594.[80] In her struggle with Spain, these rules in so far as they protected neutral ships carrying goods of any sort to the enemy, had been set aside and absolute prohibition of such trading had been enjoined, the penalty being set at the confiscation of ship and cargo.[81] The Low Countries in their necessity legalized operations which went beyond the French rule of hostile infection and might have been taken as a pattern by the belligerents in the wars following the French Revolution. A comparison of the practice in this war with the Dutch efforts of the next century affords the best possible illustration of how self-interest overcomes principle, a truth that forms the background for every movement either forward or backward in the history of the immunity of private property from capture at sea.

It was fortunate for the cause of progress that during the seventeenth century Holland was the common carrier for Europe. Dependent upon the freight derived from this extensive transport system, Holland's shipowners influenced their government to sponsor the twin maxims: free ships, free goods; enemy ships, enemy goods. The latter concession to belligerents was the price paid for the former obtained by neutrals.

This wedge introduced by the Netherlands into the old system was driven home by the continual efforts of the Grand Pensionary De Witt and his successors. Dutch disappointment at the French interpretation of the treaty of 1646 has already been noted. Four years later Spain agreed to a treaty with the United Provinces, the first to contain the new rules.[82] With Great Britain they were less fortunate, the treaty of 1654 maintaining the so-called English rules,[83] although in the same year

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[80] Quoted from Ward by Boeck, p. 35.

[81] Boeck reproduces the Dutch Placards of July 27, 1584; April 15, 1586; and of August 4, 1586 from Lamberty: *Mémoires pour servir à l'histoire du XVIIIe siècle* (The Hague, 1731); see Boeck, pp. 35–36.

[82] Dumont, VI, 1, p. 571.

[83] *Ibid.*, VIII, p. 74.

Great Britain granted to Portugal the privilege so ardently desired by the Dutch.[84] France yielded to importunity in 1661,[85] Great Britain not until 1667,[86] at the end of a war in which London for the first and last time had heard the guns of a hostile fleet, and when it was essential to gain the support of Holland against Louis XIV in the Spanish Netherlands.

Holland was able to attain the renewal of her principles with England in 1674[87] and in 1689,[88] but was unsuccessful in 1784.[89] On the other hand, all Dutch treaties with France after 1661 and up to 1854 contained the new regulations.

While Holland was urgent in her petitions for conventions so well suited to her interests, her practice when at war exhibited the opposite viewpoint. In the first part of the seventeenth century she warred with Spain; in the second part with France. In 1630 an edict was issued declaring a paper blockade of the ports of Flanders and every ship met on the high seas bound for those ports good prize.[90] In 1689 she bound herself with Great Britain to prevent all neutral nations from trading with France.[91] This violation of treaties aroused Sweden and Denmark to form an armed neutrality which had influence enough to bring the belligerents to respect their treaty engagements.[92]

Throughout the eighteenth century Holland maintained a consistent support of her principles. She acceded to the Armed Neutrality, too late to escape the consequences of her friendship for the American cause.[93] Following the war Holland's treaty with the United States contained the maxims favorable to neutrals.[94] By this date the importance of Holland's position on maritime regulation had fallen with her loss of rank as a great power.

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[84] *Ibid.*, VI, 2, p. 84.
[85] *Ibid.*, p. 346.
[86] *Ibid.*, VII, 1, p. 49.
[87] Dumont, VII, 1, p. 119.
[88] *Ibid.*, VII, 2, p. 236.
[89] Martens, *Rec.* III, p. 560.
[90] Wheaton, H., *Histoire des progrès du droit des gens*, 4th ed. (Paris, 1865). I, pp. 183–185.
[91] Dumont, VII, 2, p. 238; Hautefeuille, *Droits et devoirs des neutres* (Paris, 1868), 2, p. 29.
[92] *Ibid.*, p. 325; see Boeck, p. 42.
[93] Martens, *Rec.* III, pp. 215–222.
[94] *Ibid.*, p. 439.

IV. The Practice of Other European States Previous to 1854

The great systems of the law of capture at sea and their sources have been outlined. Certain states which today rank as great powers have been only incidentally mentioned, together with others which have never risen to first rank, or have fallen from that position. For the sake of completeness it should be noted that Sweden, Denmark, and Portugal, while following with Europe generally the customs of the *Consolato* previous to the rise of the Dutch principles, after the middle seventeenth century followed the lead of Holland in seeking treaties which should protect them as neutrals. Where the prejudices of stronger states imposed less desirable terms we find treaties, such as that of 1661 between England and Denmark, which contain the rules of the *Consolato*.[95] And as belligerents these nations reproduced the situation demanded by self-interest. In 1659 Denmark proclaimed all merchandise consigned to Swedish ports confiscable.[96] In 1715 Sweden enforced against Russia an ordinance for the condemnation of enemy goods on neutral ships, neutral goods on enemy ships, and neutral goods on neutral ships, if the ship carried any contraband goods whatever.[97]

Denmark and Sweden were members of the three armed neutralities, all of which have been sufficiently touched upon. In the latter two of these important leagues of neutrals they were associated with Russia and Prussia, both powers which attained recognized standing in Europe in the eighteenth century. Previous to 1780 Russia's practice as indicated by her treaties depended upon the state with which the treaty was made. In 1715 Russia and the United Provinces agreed to let free ships make free goods.[98] In the same year Peter the Great carried on the war with Charles XII of Sweden without restricting neutral commerce. In 1734 Russia's treaty with Great Britain went no further than the *Consolato*.

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[95] Dumont, VI, 2, p. 346.
[96] Boeck, pp. 43–44.
[97] *Ibid.*, p. 50.
[98] Dumont, VIII, I, p. 431.

For the usage of Prussia prior to the Armed Neutrality of 1780 we have the arguments *tels quels sont* of the Prussian commissioners in the Silesian Loan Controversy which will be better left to a later chapter. In 1762 a treaty with Sweden provided for the observance of the "twin maxims."[100] For both Russia and Prussia the ratification of the treaties by which they bound themselves to observe the principles of the Russian manifesto of 1780 was their first great contribution to the development of a just law of capture at sea.

The famous manifesto of Catherine II was a protest against British conduct in maritime warfare. It was dated February 28, 1780, and was incorporated with some amplification in treaties between Russia and Denmark,[101] Sweden,[102] Holland,[103] Prussia,[104] the Emperor,[105], Portugal,[106] and the Two Sicilies.[107] France and Spain were not at the time in a position to become members of an association of neutrals, but they expressed their adherence to its doctrines.[108]

The second article of the manifesto, the only one which concerns this essay,[109] marks an advance over the Dutch rules in that it asserts that free ships shall make free goods and omits the rule that enemy ships make enemy goods, which from long association had come to be regarded as the logical corollary of the former maxim. On the other hand, the freedom of neutral goods in enemy ships is not stipulated, indicating either an unwillingness to demand too much or a tacit recognition that the rule of the *Consolato* being already the common law of the sea did not need proclamation.

The importance of the Armed Neutrality of 1780 lies not only in the unanimity of Europe in its acceptance of the Russian proposal but in the fact that the countries who either acceded or

[100] Martens, *Rec.* I, p. 39.
[101] *Ibid.*, III, pp. 189–195.
[102] *Ibid.*, p. 198.
[103] *Ibid.*, p. 215.
[104] *Ibid.*, p. 245.
[105] *Ibid.*, p. 252.
[106] *Ibid.*, p. 263.
[107] *Ibid.*, p. 267.
[108] *Ibid.*, p. 162, 164.
[109] Quoted ante p. 13, note 2.

adhered bound themselves not only to Russia but to each other.[110] The great society of neutral nations marked the first crystallization of a new law of maritime capture; forces which they could not then control reproduced the solution of the preceding century; but the crystals appeared again in 1800 and a half century later the elements tending to oppose permanent precipitation had lost effective strength.[111]

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[110] Martens, *Armateurs* (Göttingen, 1795) pp. 158–159: "Ces conventions ont donc presque la force d'un traité général entre les divers membres de l'association sans en avoir la forme." Quoted by Boeck, p. 56.

[111] The later practice of the states dealt with in the last section has been indicated in the earlier part of the discussion with the exception of the treaty of 1785 between Prussia and the United States which is left to the chapter on American practice.

CHAPTER II

THE DECLARATION OF PARIS AND SUBSEQUENT EUROPEAN PRACTICE

"Allein, sowohl der Wiener Kongress wie jener zu Paris (1856) liessen die Frage der Freiheit des Privateigentums unberührt; man beschränkte sich auf Zugeständnisse im Interesse des Handels der Neutralen, womit allerdings mittelbar ein teilweiser Schutz des feindlichen Privateigentums erzielt worden ist, indem die Seerechtsdeklaration den Grundsatz 'frei Schiff, frei Gut' sanktionierte."[1]

The Declaration of Paris is significant in the history of the development toward immunity of private property from capture at sea. By her adhesion to it Great Britain finally gave her sanction to the principle of the freedom of enemy property under the neutral flag, a principle already established in the jurisprudence of France and accepted in theory by the United States. At the same time that part of the English rule which had been sacrificed in order to establish the inviolability of the neutral flag was revived and placed alongside the latter rule.[2] The compromise of free ships, free goods; enemy ships, enemy goods, was replaced by rules which incorporated the advantageous principles of both the *Consolato del Mare* and the Dutch system while excluding those features of each which international relations had outgrown. In principle the right to capture the private property of enemies remained in force; it was modified by the second article of the Declaration of Paris in accordance with the purpose to rid the trade of neutrals of restrictions not necessitated by regard for belligerent interests.

The British and French governments prepared the way for

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[1] Ullman, E., *Völkerrecht* (Tübingen, 1908), sec. 188, p. 511.

[2] 2. "Le pavillon neutre couvre la marchandise enemie à l'exception de la contrebande de guerre."

3. "La marchandise neutre, à l'exception de la contrebande de guerre n'est pas saissisable sous pavillon ennemie."

Martens, *Nouveau recueil général de traités*, XV, p. 792.

the Declaration of Paris by putting into practice in the Crimean War the principles adopted by the powers concerned at the end of that war. Considerations of convenience and interest were motives for the liberality which characterized the maritime warfare of 1854–56. France and Great Britain carried on their naval operations jointly. To have attempted to practice two opposing systems of maritime capture would have resulted in confusion and might have endangered the alliance.[3] France proposed the revival of the old system of commercial warfare by which all direct and indirect relations with the enemy were forbidden. The Committee of the Privy Council which included Dr. Lushington and Lord Kingsdown advised against such restrictions because former wars had shown that they resulted in equal injury to both sides.[4] The alternative, the combination of the British and French systems by the exclusion of the contradictory elements of each, was adopted.

The two governments were also concerned with the reconciliation of their interests with those of neutrals. They

> "waived the ancient belligerent rights because they knew that the exercise of such rights though based on the tradition of the laws of nations, would cost infinitely more than it was worth and would probably have secured to Russia important allies instead of leaving her isolated against the Western Powers."[5]

The agreement was to conclude with the end of the war and was not a compromise.[6] Neither France nor Great Britain received reciprocal advantages nor made any sacrifice which operated to the individual interest of either. Greater unity of action was to their mutual benefit and that they brought about. The direct beneficiaries were neutral nations and the opposing belligerent.[7] The new rules were carried out with the limita-

[3] See speech of Lord John Russell in the House of Commons, July 14, 1857, *Hansard*, third series, CXLVI, p. 1490.

[4] Ed., "The Declaration of Paris," in *Edinburgh Review*, 144, Oct., 1876, p. 189.

[5] *Ibid.*, p. 188.

[6] Johnstone, *Maritime Rights*, Ch. 9, p. 87. Quoted by Boeck, p. 106, note 2. For negotiations leading up to this agreement see Kleen, R., *Lois et usages de la neutralité* (Paris, 1898), I, pp. 42–44.

[7] For the identic declarations of March 28 and 29, 1854, see Ortolan, T., *Diplomatie de la mer*, 3rd ed., (Paris, 1856); *App. Special*, pp. 468–469; also Niemeyer, *Urkundenbuch zum Seekriegsrecht* (Berlin, 1913), Abt. I, pp. 65, 67.

tions imposed by harsh application of the prohibitions against sale *in transitu*, extended contraband lists, and the use of the principle of continuous voyage against contraband.[8]

The Crimean War was the first in which a period of grace was allowed to enemy merchant vessels in port at the opening of war to complete their lading and to proceed in safety to their home ports. Turkey made this rule the last article of her Declaration of War of October 4, 1853.[9] In the Declaration of March 27, and in the Instructions of March 31, 1854, France granted a period of grace of six weeks to Russian merchant vessels. On March 29 Great Britain provided for similar action.[10] Ships on the high seas captured by French or British cruisers and provided with the proper passports were to be released provided they were going directly to their port of destination as established by their papers.[11]

During the war Russia and the Two Sicilies entered into conventions with the United States, the former signed July 22, 1854, the latter January 13, 1855, which contained identical articles stipulating for the freedom of the neutral flag and of neutral property in enemy vessels.[12] The other governments of Europe and America to which Secretary of State Marcy directed proposals for similar conventions deferred action until the end of the war.[13]

On April 8, 1856, Count Walewski, the first representative of France, asked the plenipotentiaries of Austria, Great Britain, Prussia, Russia, Sardinia, and Turkey to agree with his country to signalize the Congress of Paris by putting an end to some of the disputes which had long hindered the development of a uniform law of maritime warfare. The four principles that he proposed were accepted by the Powers represented on April 16,

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[8] For the treatment of practice during the Crimean War see Boeck, pp. 108–113. For case of continuous voyage see Oppenheim, *International Law* 2nd ed., (London, 1912), II, p. 501.

[9] Scott, J. B., "Status of Enemy Merchant Ships" in *A. J. I. L.*, II, 1908, pp. 259–270.

[10] Boeck, p. 108.

[11] Ortolan, pp. 466–467; 470–471.

[12] Martens, *N. R. G.*, XVI, I, pp. 570, 572.

[13] Annual Message of President Pierce, December 2, 1856, Richardson, J. D., *Messages* (Washington, 1897), V, p. 412.

1856, and they constitute the Declaration of Paris, which by virtue of the ratification of all the civilized powers excepting the United States has become the most notable international document of modern times, expressive of rules of international law grounded firmly in the consent of nations.[14]

"Jamais, ni au Congrès de Westphalie, ni à celui de Vienne rappelés par le Comte Walewski, il n'y eut une belle unanimité parmi les puissances; et jamais encore des principes plus nets et plus fermes, reconnus d'une façon aussi solennelle, n'avaient été proclamés dans les droits de la guerre, jamais progrès plus complet n'y avait été réalisé."[15]

Spain and Mexico based their refusal to adhere to the Declaration upon the relative weakness of their navies and the necessity of a possible recourse to privateering. Both of these states were willing to assent to all but the first rule, but the terms of the Declaration provided that acceptance or rejection must be *in toto*. The attitude of the United States involved practical and theoretical considerations which will be taken up in other chapters.

The unanimity manifested at the Congress of Paris was not belied by the practice of the nations in the wars which followed. Within fifteen years seven wars, four European, two American, and one Oriental, had been fought. In each of the six with which this chapter is concerned, not only were the rules of the Declaration observed, but there was made some advance beyond them.

By the third article of the treaty of Zurich (November 10, 1859) it was stipulated that the French Government should restore those Austrian vessels which had been captured but not adjudged confiscate prior to the cessation of hostilities.[16] On March 29, 1865, a decree of France ordered similar disposal of Mexican vessels captured but not condemned.[17] Except for the

[14] Holland, T. E., *Letters on War and Neutrality* (London, 1909), p. 123, notes the adherence of Spain and Mexico in 1908 and 1909 respectively.

[15] Funck-Brentano, Th., "La declaration de Paris de 1856 et son application dans les temps modernes" in *Revue générale de droit international public*, I, 1894, p. 326. For concise statement of the negotiations regarding the Declaration see Niemeyer, pp. 53–64.

[16] Martens, *N. R. G.* XVI, 2, p. 517.

[17] Cauchy, E., *Du respect de la propriété privée dans la guerre maritime* (Paris, 1866), pp. 120–121. Quoted by Boeck, p. 128.

confiscation of a portion of the captured Mexican merchantmen, this treatment was analogous to sequestration.

During the Anglo-Chinese War of 1858–1860 in which France participated, Great Britain permitted, and France did not prohibit, enemy trading with China. Chinese vessels and cargoes trading to the ports of either of her enemies were free from capture. This limitation of capture was justified by the advantages it secured in the control of Chinese trade, since the ships and goods of China proceeding to other than French and English possessions were confiscable.[18] The action of the two governments appears to have been based upon narrow grounds of selfish interest, and to have amounted in fact to an attempt to capture all Chinese trade, depriving individual proprietors of their freedom to choose their markets, while suffering them to escape direct loss of property.

The right of prize was exercised by Denmark, Prussia, and Austria in the war over Schleswig-Holstein. The treaty of peace, however, annulled its effects by providing (October 30, 1864, Art. 13), that all merchant ships captured by either side should be returned, or their ascertained value or diminution of value be paid.[19] "Ainsi le traité de paix . . . reconnut implicitement la règle que, même dans les guerres maritimes la propriété privée doit être respectées."[20] The fact that this settlement was entirely to the advantage of the victorious nation deprives it of significance except as it may be considered to indicate that the interest of the merchant is an interest of large importance to belligerent nations, one to be protected wherever possible.

Articles 211 and 212 of the Italian merchant marine code abolish the capture of mercantile vessels of an enemy state on condition of reciprocity, exempting contraband from this moderation.[21] Article 215 decrees the confiscation of the neutral ship

[18] Hautefeuille, L. B., *Questions de droit maritime international* (Paris, 1868), p. 106, n. 1.

[19] Martens, *N. R. G.*, XVII, 2, pp. 478–480.

[20] Bluntschli, J. C., "Du droit de butin" (Abridged translation of *Das Beuterecht im Krieg und das Seebeuterecht insbesondere*) in *Revue de droit international*, IX, 1877, p. 554.

[21] Art. 211. "La cattura e la preda di navi mercantili di nazione nemica per parte delle navi da guerra dello Stato saranno abolite in via die recip-

whose cargo is composed wholly or partly of contraband. Article 243 provides that the merchant ships of the enemy state in port or territorial waters on the outbreak of war shall be free to depart when they will unless the government sets a definite period for their departure, or determines to act otherwise by way of reprisal. Article 244 allows for optional condemnation or sequestration.

When war broke out in 1866, Italy had only to put into operation these provisions of her maritime law. Austria and Prussia on the 13th and 19th of May respectively had decreed immunity to enemy ships and their cargoes on condition of reciprocity and excepting ships carrying contraband or breaking blockade.[22] Although none of the belligerents were important maritime powers, they were all states of the first rank.

The value of the precedent set in 1866 finds recognition in the ordinance of the king of Prussia, July 18, 1870. Without mention of reciprocity, the capture of innocent enemy merchant ships and cargoes was forbidden.[23] France with a navy powerful enough to blockade her enemy's ports followed the rules of 1856, granting, however, a thirty days' delay in which enemy ships in

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rocita verso quelle potenze, che adotteranno equale trattamento a favore della marina mercantile nazionale. Il trattamento di reciprocità dovrà risultare da leggi locali, da convenzioni diplomatiche, o da dichiarizioni fatte dal nemico prima del Cominciamento delle ostilità."

Art. 212. "Sono escluse dal disposto dell' articolo precedente la cattura e la confisca per contrabbando di guerra, nel qual caso la nave in contravenzione sarà assoggetata al trattamento delle navi neutrali che infrangono la neutralità. Sono pure escluse dal disposto di cui sopra, la cattura o confisca per rottura di blocco effettivo e dichiarato." Quoted by Niemeyer, pp. 150–151. Law of 1865 incorporated in Code of 1871.

[22] Austrian Decree:

Art. I. "Les navires marchands et leurs cargaisons quoiqu' appartenant à un État ennemi, de l'Autriche, ne peuvent être capturés en mer ni declarés de bonne prise, quand l'État ennemi agit de même envers les vaisseaux marchands autrichiens."

Art. II. "L'article premier n'est pas applicable aux navires marchands qui portent de la contrebande de guerre ou qui rompent un blocus légalement obligatoire."

Prussian Decree:

"Sur la proposition du ministre d'État, il est ordonné qu'en cas de guerre, les navires marchands de l'État ennemi ne seront pas capturés par nos navires de guerre, à condition de reciprocité. Toutefois cette disposition ne sera pas applicable aux navires qui seraient sujèts à capture s'ils étaient neutres." *R. D. I.* VII, 1875, p. 573, n. 2.

[23] Martens, *N. R. G.*, XIX, p. 588.

port when war began or having subsequently entered in ignorance of the state of war might leave with safe conducts.[24] On January 19, 1871, Prussia revoked the ordinance of July but had condemned no enemy vessels before peace was declared.[25] The small number of captures made by France, some 75 vessels valued at 6,000,000 francs, affords no measure of the indirect loss inflicted by France through her retention of the right of prize. The Treaty of Frankfort stipulated that the merchant vessels and cargoes, not condemned before March 2, 1871, should be restored or if this were impossible, their value, ascertained on sale, should be returned to their owners. As at the peace between Prussia and Denmark, the balance of advantage from this arrangement lay too heavily with the victors to give it great importance as an indication of regard for the rights of private owners.

We have not examined the practice of the destruction of enemy prizes at sea for the period previous to 1856 because until that date the support of international opinion for the rule of respect for neutral property in enemy bottoms had constantly wavered. Since that date the question of destruction has had a direct bearing upon the effectiveness of the third rule of the Declaration of Paris and may indicate the futility of the attempt to exempt enemy property.[26] The United States Government in 1812, in the desire to use every cruiser to its fullest effectiveness, instructed its naval officers to destroy enemy ships without scruple.[27] The Confederate application of the same theory during the American Civil War is notorious. The legality of the practice is unquestioned. But the British prize courts have established the rule of compensation where neutral property is destroyed in consequence.[28] The existence of this rule

[24] Scott, J. B., *A. J. I. L.*, II, 1908, p. 263. This decree explained by circular of August 13, 1870, *N. R. G.*, XIX, pp. 588–590.

[25] *N. R. G.*, XIX, p. 590.

[26] Bentwich says: "The Declaration of Paris which exempted neutral goods under an enemy flag from capture has been followed by the practice of prize destroying; necessities of war would probably follow in the wake of legal exemption of enemy vessels". *War and Private Property* (London, 1907), p. 95.

[27] Bentwich, p. 95.

[28] *The Felicity*, 2 Dods., 383; *The Leucade*, Spinks, 221.

was denied by the decision of the French prize court in 1872 which refused compensation to neutral owners of non-contraband goods on board the German ships *Ludwig* and *Vorwaerts* burned at sea by the *Dessaix*. The court held that while

"under the terms of the Declaration of Paris neutral goods on board an enemy's ship cannot be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale of payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;"

in this case

"the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity."[29]

Oppenheim dismisses the decision with the statement that "it seems to be obvious that, if the destruction of the vessel herself was lawful, and if it was not possible to remove her cargo, no indemnities need be paid."[30] Hall goes further, his view being that

"the case shows the danger of a belligerent pushing his undoubted right too far and depriving the neutral of the right given him by the Declaration of Paris of using enemy vessels as a means of transport: . . . It ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege that he has acted under the pressure of a real military necessity."[31]

On May 26, 1877, Russia, at war with Turkey, issued an imperial ukase recognizing, *inter alia*, the necessity for the observance of the rules of the Declaration of Paris. By another article of the same document Turkish mercantile vessels in Rus-

[29] Calvo, C., *Le droit international* (Paris, 1896), sec. 3033.
[30] *International Law*, II, p. 244
[31] Hall, W. E., *International Law*, 6th ed. (Oxford, 1909), p. 720.

sian ports and harbors were given the time necessary to permit their loading with non-contraband goods and were then permitted to depart.[32] Turkey failed to follow her own precedents with a similar decree.

The war of 1884–85 between France and China did not raise the question of capture of non-contraband enemy goods, since France allowed trade to continue except to blockaded ports. In view, however, of developments in later wars, it is worth noting that Great Britain made a strenuous resistance to the French declaration of rice as contraband. Earl Granville, on February 22, 1885, said that the British Government could not admit that provisions in general should be considered as contraband of war, that this could not be admitted even if the destination were a port of naval equipment and that

> "in the view of Her Majesty's Government, the test appears to be whether there are circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of this kind are intended for the ordinary use of life and to show, prima facie at all events, that they are destined for military use."[33]

Both governments maintained their original positions.

The war of 1894–95 between Japan and China found Japan an adherent of the Declaration of Paris;[34] China, if not, as Professor Ariga says, "from the viewpoint of the laws of war comparable to the Turks, the Arabs, or the Redskins,"[35] had not advanced to the position attained by Japan. Neutrals were concerned with the attitude Japan would take toward applying the Declaration of Paris. The general opinion was that Japan was bound to carry out the rules of that Declaration toward neutrals and that China was not bound; that the Chinese navy might therefore seize enemy property under neutral flags, while the Japanese might not do so. It was argued, however, that this opinion could be attacked on the ground that inasmuch as Japan

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[32] Martens, *N R. G.*, second series, 2, p. 216.

[33] *Br. and For. State Papers*, LXXVI, p. 435 ff. On March 11, 1885, the French foreign office in a note to Earl Granville declared that "The importance of rice in the provisioning of the people and army of China made it necessary for the French government to forbid its transport into north China."

[34] Ariga, Nagao, *La guerre sino-japonaise* (Paris, 1896), p. 3.

[35] *Ibid.*, p. 9.

was bound toward neutrals but not toward China and as China's interest in having her goods transported was at least as great as were the interests of neutrals in transporting them, it would be more just to permit Japan to seize enemy property on condition that she respected the neutral ship from which it was taken. Otherwise, Japan's willingness to advance with western nations would result to her disadvantage.[36] It is difficult, however, to see how such an interpretation of the rule leaves it any force at all. It would seem preferable to take the viewpoint adopted by Professor Ariga based on the work of Twiss which he quotes.[37] Twiss regarded the Declaration of Paris as binding only between those states which had signed and ratified it, the common law privileges forbidden by it remaining to the signatory states with regard to nations which had not adhered. In effect the question had small importance since Japan voluntarily placed the rules of the Declaration in force and since the maratime operations were insignificant in comparison with those on land, the Japanese being desirous of hampering neutral commerce to the least possible degree. China reciprocated by conforming her conduct to that of Japan and respecting fully the rule that the flag covers the cargo.[38]

The South African War, carried on by Great Britain with states which possessed no fleet and no seacoast, nevertheless served to point out the changed nature of the questions which have developed with changed law and altered circumstances. With the subjects of blockade and contraband this study is not concerned, except as they react in practice upon the general immunity of private property. An incident which is but one of several of like character in this war involving neutral merchants of the United States, France, Holland, and Germany, illustrated how the application of the principles of visit and search and the

[36] "Chronique des faits internationaux" in *R. G. D. I. P.*, I, 1894, pp. 469–470. In chapter III of the present discussion is quoted the American opinion in 1859 relative to the obligations of the signatory powers of the Declaration of Paris toward non-signatory neutrals, that opinion contemplating, however, that all belligerents concerned had adhered to the Declaration.

[37] Ariga, p. 7. Twiss, however, appears to have only the first rule of the Declaration in mind.

[38] Lawrence, T. J., *Principles of International Law*, 5th ed., (London, 1913), p. 667.

doctrine of continuous transport could combine to hamper seriously innocent neutral trade and to arouse keen resentment in neutral countries.[39]

The Transvaal Government was known to be receiving supplies of contraband articles through the Portuguese port of Lorenzo Marques on Delagoa Bay. On suspicion that they were carrying munitions and soldiers, the British squadron in African waters seized in December, 1899, and January, 1900, three German merchantmen, the *Herzog,* the *General,* and the *Bundesrath,* all belonging to the German East Africa company. As the suspicions were found to be without basis, the vessels were released without trial, but not before the German Government had entered a vigorous protest which later had the effect of obtaining compensation for the losses due to detention.

The British Government had thus, at a comparatively early date, found its acquiescence in the principles enunciated by the American prize courts as a foundation for the doctrine of continuous voyage to be justifiable. The incident shows as did the practice in the American Civil War that belligerents, deprived by law of one weapon, will seek another. The abrogation of the right to capture enemy goods in neutral vessels meant that such goods would seek neutral transports. Stopped by belligerent vessels or prevented by intervening territory from reaching an inland state directly, neutral vessels would go to the nearest neutral ports. To prevent the enemy from obtaining contraband, the belligerent repudiated the requirement of a hostile destination and seized neutral vessels en route to neutral ports.

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[39] The application of continuous voyage in the modern sense, dates from the American Civil War. But see article by Woolsey, L. H., "Early Cases on the Doctrine of Continuous Voyage" in *A. J. I. L.* IV, 1910, pp. 823–847. For a treatment of the cases and opinion in the South African War see the "Chronique" in *R. G. D. I. P.,* 7, 1900, pp. 804–827. On p. 807, the writer of the "Chronique" says: "Cette application nouvelle de la théorie du voyage continu était inévitable si l'Angleterre voulait réprimer les expeditions de contrebande de guerre au Transvaal et dans la République d'Orange qui ne sont pas des États maritimes. En fait, les croiseurs de la Grande-Bretagne ont agi à l'égard des navires neutres se dirigeant vers les ports de la colonie portugaise de Mozambique absolument comme s'ils allaient à des ports situés en pays ennemi . . . .". See also Baty, T., *International Law in South Africa* (London, 1900), Ch. 1, and Campbell, R. G., *Neutral Rights and Obligations in the Anglo-Boer War,* (J. H. U. Studies, Baltimore, 1908); 26, pp. 230–264.

Hall's words with respect to American practice apply as well to British practice in the South African War except that in the latter cases guilt was not established, and hence the suspected vessels were released:

"Vessels were captured while on their way from one neutral port to another, and were then condemned as carriers of contraband or for intent to break the blockade. They were condemned not for an act,—for the act was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole,—but on mere suspicion of intention to do an act."[40]

In the case of the three German vessels, while the principle of continuous transport led to their being visited, it was the changed circumstances of ocean transport that necessitated conducting them into Durban for search. The right of visit and search, of itself no serious hardship to neutral commerce, when exercised upon great steamships carrying thousands of tons of the products of many different countries, necessitating their being carried into port to be there detained for an indefinite period, contains within itself an almost unlimited potentiality of injury to entirely innocent commerce. This is true where the belligerent acts *bona fide;* there are further possibilities when he deliberately makes use of visit and search to compensate himself for rights relinquished in 1856. International law now forbids the capture of innocent enemy property in neutral vessels; it does not forbid, except by inference, the bringing into port of enemy cargoes upon flimsy suspicions and the detention of such cargoes at the captor's will.

The Russo-Japanese war evoked problems in maritime law which clearly illustrate the necessity for taking account of the influence of developments in law and fact upon the actions of belligerents and upon their attitude toward neutral rights. Russia, in her Imperial Order of February 28, 1904, commanded that the second and third rules of the Declaration of 1856 be observed.[41] Japan did not publish similar orders but she acted in conformity with the rules. Was the conduct of the war such as to demonstrate the effectiveness of the rules and to encourage

[40] Hall, p. 668.
[41] *Parliamentary Papers,* 1905, 103, Cd. 2348, p. 4.

hope for further advance, or did the belligerents accomplish prohibited results by the extension and expansion of admitted rights?

The liberal allowance of the American Government in 1898 relative to days of grace was not taken as an example by either power. Japan granted a week, February 9–16, 1904, to Russian vessels in her ports or leaving other ports for Japanese ports up to the latter date and returning to Russian ports by an assigned route.[42] Russia granted but forty-eight hours from the time of publication of the ukase by the local authorities of each port, and included in the exemption only Japanese vessels in Russian ports.[43] Lawrence finds reason for the small concession of Russia in the relative importance of Japanese over Russian commerce in the north Pacific.[44] The Japanese decree was very strictly interpreted. Deep-sea fishing vessels were regarded as outside its operation.[45]

Both governments made full use of the right of capture. Russia, alone, operating at a distance from her home ports, sank many of her prizes, enemy and neutral. Out of a total of 16 Japanese and 15 foreign steamships visited or attacked by the Russians, 9 Japanese and 6 foreign steamships were sunk.[46] While there appear to have been no important claims by neutral owners of cargo on the destroyed enemy ships, the simple fact that the Russian naval officers did not bring a single enemy steamship into port for trial demonstrates a readiness to act upon an *a priori* assumption of necessity rather than to treat each encounter according to circumstances in order to insure the maximum of protection to both enemy and neutral private property.[47]

The treatment of neutral commerce by the belligerents became important with the rapid disappearance of the Russian

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[42] *Foreign Relations of the United States,* 1904, pp. 414–415.

[43] *Parliamentary Papers,* 1905, 103, Cd. 2348, p. 4.

[44] Lawrence, T. J., *War and Neutrality in the Far East* (London, 1904), p. 53. He draws from the situation the probability of similar action against England at war with a maritime power.

[45] Hurst, C. J., and Bray, F. E., *Russian and Japanese Prize Cases* (London, 1912–1913), II, pp. xx–xxi, pp. 80–99.

[46] Takahashi, S., *International Law Applied to the Russo-Japanese War* (New York, 1908), pp. 275–276.

[47] *Prize Cases,* I, pp. vi–xi.

navy from belligerent waters, and the passing of contraband trade largely into neutral hands. Neither Russia nor Japan discriminated between neutral and enemy vessels in respect to the contingencies in which destruction was permissible.[48] This failure to discriminate meant that neutral vessels suffered, not that enemy vessels received merciful treatment.

The cases that arose during the war have been treated extensively by learned publicists and need only be outlined here.[49] They are of interest if from them can be drawn reasonable deductions as to their effect upon the question of immunity.

On July 16, 1904, the *Hipsang,* a British steamer sailing between two Chinese ports with a cargo of beans and beancake, was torpedoed by a Russian destroyer. The Russian Prize Court found that the *Hipsang* had endeavored to escape and that the action of the destroyer had been correct.[50] A British naval court of inquiry found, however, that the captain of the *Hipsang* had stopped when ordered to stop, and that she carried no contraband goods, and no Japanese persons; that therefore her destruction was unjustifiable.[51] The two decisions were based on directly opposing statements of fact, the evidence of the former statement justifying the Russian decree.[52]

On July 23 and 24, 1904, the Vladivostok squadron sank two neutral steamers, the *Knight Commander,* British, sailing from New York to Yokohoma and Kobe, with a cargo of railway material and flour; and the *Thea,* German, chartered by a Japanese firm for the coasting trade, with a cargo of fish products not suitable for food. In the first case, lack of enough coal to take the ship to a Russian port was alleged as the ground for sinking, while the carriage of a cargo more than half contraband was made the justification for condemnation. Compensation

[48] "Prize Regulations, Japan, Mch. 7, 1904", in *Prize Cases,* I, p. 438; Russia, *Ibid.,* II, pp. 315–316.

[49] Takahashi, *International Law Applied to the Russo-Japanese War;* Hershey, A. S., *International Law and Diplomacy of the Russo-Japanese War* (New York, 1906); Lawrence, *War and Neutrality in the Far East;* Hurst and Bray, *Russian and Japanese Prize Cases;* Sibley, N. W., *International Law as Interpreted during the Russo-Japanese War,* (Boston, 1905).

[50] *Prize Cases,* Russia, II, pp. xxi–xli.

[51] *Times,* London (weekly edition), August 26, 1904.

[52] Lawrence, *War and Neutrality,* p. 260.

was granted for the non-contraband goods destroyed in consequence of the sinking of the *Knight Commander*. The court held that the question of the regularity of the sinking of a captured ship was a matter only for the superior of the officer who gave the order for the sinking and not for the prize court.[53] It was to the last mentioned portion of the judgment that British opinion took especial exception. The Prime Minister, Mr. Balfour, said in the House of Commons:

> "Evidently if it is left to the captain of a cruiser to decide on his own initiative and authority whether particular articles carried on a ship are, or are not, contraband, what is not merely a practice of nations, but what is a necessary foundation of equitable relations between belligerents and neutrals would be cut down to the root."[54]

Such a rule would mean an unlimited capacity to extend the contraband list and that without forewarning. In response to the British protests Russian naval commanders were, on August 5, 1904, instructed "not to sink neutral merchantmen with contraband on board in the future except in cases of direst necessity; but in cases of emergency to send prizes into neutral ports."[55] The Admiralty Court at St. Petersburg reversed the decision and paid an indemnity of £100,000 to the British Government.[56]

The trial court in the case of the *Thea* held that both the ship and cargo were liable to condemnation, as being engaged in the enemy's trade. The decision was reversed on appeal, compensation being given for the sinking of the ship but none for the cargo, as there had been no appeal in regard to the latter.[57]

In spite of the instructions of August, 1904, Russian cruisers on June 4 and 5, 1905, sank the British merchantmen *St. Kilda* and *Ikhona* and on June 21, 1905 the Danish *Prinsesse Marie*. The decision of the original court in the case of the *St. Kilda* turned on the question whether or not the cargo was conditional contraband. Its affirmative holding was reversed on appeal and compensation granted for the value of the ship and the non-con-

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[53] *Prize Cases*, II, pp. 54–95.
[54] *Hansard*, 4th Series, CXXXVIII, 1904, pp. 1480–1481.
[55] *Chicago Daily Tribune*, August 6, 1904.
[56] London *Times* (weekly), March 17, 1905; Hershey, pp. 144–147.
[57] *Prize Cases*, II, pp. 96–117.

traband goods destroyed, but without consequential damages.[58] The cases of the *Ikhona* and *Prinsesse Marie* were practically identical as to fact and decision.[59] In all three cases the reason for sinking was that there was no Russian or neutral port to which the vessels could be taken, and the courts held that the grounds of suspicion of contraband justified the destruction. The principle or absence of principle running throughout all these decisions was that the justification for sinking was to be drawn from the facts determining the character of the cargo rather than from the circumstances surrounding the capture. Allegations upon the latter point were poorly supported and the prize courts did not consider it essential to determine the degree of necessity and thereby to justify the act of sinking before proceeding to ascertain the nature of the cargo. They thus acted in accordance with the rules of the Russian prize regulations which permit the same treatment of enemy and neutral vessels.

Russia made use also of the simple right of capture to restrict the lawful freedom of commerce. In the case of the *Allanton* the lower court attempted to condemn a British ship sailing to Singapore from Sasebo with a cargo of Japanese coal, on the ground that her real destination was hostile and her cargo therefore contraband, and also on the ground that on her previous voyage she had carried coal from Cardiff to Sasebo. The decision was reversed and both the ship and her cargo were released.[60] Lawrence, writing of the decision of the lower court, affirmed that "any recognition on our own part of its validity would be a more serious blow to our seaborne trade than acquiescence in the capture of a few merchantmen by unauthorized cruisers." This detention appears to have been entirely unwarranted and arbitrary. Enemy property having been made incapable of being captured on neutral vessels, recourse was taken to deductions that the cargo was really destined for the enemy's fleet or naval base, drawn from the most flimsy allegations of fraud.[61]

[58] *Prize Cases*, II, pp. 188–225.
[59] *Prize Cases*, II, pp. 226–275, 276–310.
[60] *Prize Cases*, II, pp. 1–16.
[61] See Lawrence, *War and Neutrality*, pp. 221–247.

The cases of the *Arabia* and the *Calchas* further illustrate the tendency toward extension of the contraband list and the effects of such extension, directly felt through confiscation of property; indirectly through detention of the neutral carrier and the innocent property in the same bottom. These vessels, the former German, the latter British, were carrying flour, machinery and railway material from Portland, Oregon, and from Tacoma, Washington, respectively, to Hongkong and Yokohama. In both cases the cargo owners claimed that the true consignees in Japan were commercial houses, and that the cargo was not intended for the Japanese army or navy. Both vessels, after several months' detention, were released, the *Arabia* with her cargo. The *Calchas'* cargo was more largely foodstuffs and cotton, and portions of it were confiscated.[62] Hershey quotes a Russian official's explanation of the discrimination between the German and the English cases:

"Foodstuff consigned to an enemy's port in sufficient quantity to create the presumption that it is intended for the use of the government military or naval forces is *prima facie* contraband and sufficient to warrant holding it for the decision of a prize court. Even if consigned to private firms, the burden of proof that it is not intended for the government rests upon the consignor or consignee. If it can be proved that it is intended for non-combatants, it will not be confiscated. Small consignments of foodstuffs in mixed cargoes will be considered presumptively to be regular trade shipments and will not be seized as contraband."[63]

The obvious tendency in these two cases was to break down the distinction between contraband and non-contraband goods by excluding the notion of conditional contraband. They resemble the case of the *Allanton* in that they are attempts to strike at enemy property by an extension of the contraband list; they differ in the degree of inference required to transform an apparently innocent destination into an actually hostile one.

The Russian Government was influenced by the protests of neutrals to the extent of incorporating into its instructions to

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[62] *Prize Cases*, II, pp. 42–53; 118–144.

[63] Hershey, p. 178; Quoted from New York *Times*, August 7, 1904. For the British and American Notes in protest of the Russian attitude toward *res ancipitis usus* see Hershey, pp. 178–181.

naval commanders and prize courts an interpretation of the rules of Article VI, section 10 of its Prize Regulations, which admitted the doctrine of conditional contraband with regard to rice and other foodstuffs. The scope of the admission was extremely narrow, and even within the limited field of its application, whenever circumstances indicated that *res ancipitis usus* were being consigned to private individuals, thence to be transmitted to the enemy forces, they would be condemned. Henceforth, however, it was for the captor to prove the guilt of conditional contraband.[64]

The discussion of Russia's efforts to evade the law of nations with regard to enemy private property at sea may be completed by a reference to her exercise of the right of visit and search. On July 13, 1904, the British P. & O. liner, *Malacca,* was captured in the Red Sea by the Russian auxiliary cruiser *Petersburg* and brought to Port Said. The *Malacca* carried 23 tons of munitions of war but the containers were plainly marked as British government stores. Two weeks after capture the *Malacca* was released.[65] With the more important issues involved in her capture we are not concerned. The incident serves as an example of the tendency toward arbitrary treatment of neutral vessels through an appreciation by the belligerent of the possibilities that now lie in the right of search.

> "Instead of advance we see everywhere retrogression—days of grace shortened, the right of search used to the fullest extent without regard for the interests and susceptibilities of neutrals, no immunities granted to mail steamers,[66] the law of contraband so extended that nearly all trade with the enemy is brought within it, and that at a time when the blockade of one of the least of his ports is utterly out of the question, the penalties on neutral vessels engaged in forbidden acts arbitrarily increased . . . "[67]

This arraignment of Russian conduct of maritime operations does not appear to be exaggerated, in view of the facts recited.

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[64] *Parliamentary Papers,* 1905, 103, Cd. 2348, Nos. 29, 30, 39; Cited by Hershey, p. 182.

[65] Hershey, pp. 139–142.

[66] For the discussion of the treatment of mail steamers and mail bags, see Lawrence, *War and Neutrality,* pp. 185–200.

[67] Lawrence, *War and Neutrality,* pp. 262–263.

Japanese prize courts applied the principle of conditional contraband from the beginning of the war. Of a total of 64 vessels captured by them, 48 were sailing under neutral flags. Of the latter number but 14 were released. The prize court condemned 25 neutral ships for carriage of contraband.[68] The situation of Russia in the Far East being, as it was, such that cargoes destined to ports occupied by her were *ipso facto* en route to places which contained armed enemy forces, these condemnations were easily justified.[69] As to cases of enemy property covered by the Declaration of Paris, Japan followed the rule of domicile, and her decisions seem not to have been challenged by European or American opinion. Japan was in the fortunate position of being able easily to follow the accepted rules of law, and this she did strictly but without attempting to inaugurate any advance. Like that of Russia, her decree published February 11, 1904,[70] aroused neutral protest for its listing of provisions as conditional contraband. "Quelques-unes des prohibitions édictées sont tellement surannées que leur rappel après leur condamnation depuis longtemps universelle, a dû nécessairement provoquer une veritable stupéfaction. Il en est ainsi, en particulier, de celles rélatives a l'argent et aux vivres."[71] The same writer points out that in the South African war the English restored cargoes seized on neutral ships at the demand of the United States, and that "comme la pratique, les legislations nationales, et les traités, depuis deux siècles et demi, ont aussi édicté l'immunité des vivres."[72]

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[68] *Prize Cases*, I, vi–xxvi.

[69] Kleen points out that, as Japanese naval vessels could capture a vessel on presumption that the cargo was destined to be employed by the enemy army or fleet, the way was left open to arbitrary seizures; "Les décrets prohibitifs" in *R. G. D. I. P.*, XI, 1904, p. 359.

[70] *R. G. D. I. P.*, XI, 1904, Documents, p. 13.

[71] Kleen, *R. G. D. I. P.*, XI, 1904, p. 355.

[72] *Ibid.*, p. 355. His supposition as to the reason why Russia declared cotton contraband shows that even at that date cotton was considered relatively unimportant as an ingredient in the manufacture of explosives: "L'interdiction étrange du coton qui figure dans l'ordonnance moscovite de 1904 ne peut s'expliquer que par la supposition du gouvernment russe que les Japonais se trouvant par hasard avoir momentanément un besoin pressant de coton pour quelque but se rattachant à l'équipement des troupes, la prohibition de cette matière première pourrait leur render cet équipement plus difficile". *Ibid.*, 356–57. For text of Russian decree see same volume of the *Revue*, Documents, p. 13.

To the effectual application of the existing limitations upon capture the extension of the list of contraband by belligerents is the most dangerous impediment because the most insidious and the most readily accomplished on the basis of temporary selfish interest. In 1877 Russia added only sulphur and saltpetre to the list of contraband generally recognized; in 1904 she added provisions, combustibles of all kinds, materials for the construction of ships of all sorts, horses, and other beasts of burden, telegraphic and telephonic apparatus, railway materials, sulphur, saltpetre, and cotton. Japan omitted cotton from her list; otherwise, it was practically as extensive. Lawrence takes the figures for Japanese imports in 1902, £29,000,000, and asserts that if Russia had not made "concessions from her first contraband list, £21,000,000 of this amount would have been liable to capture," and that £16,000,000 did remain liable.[73] At the time English goods in English vessels and American goods in American vessels constituted the greater part of these imports, so that Russia, given a fleet strong enough to maintain her prohibition, might have cut off the bulk of her enemy's commerce without blockading a single port.[74] Kleen put the query which will have to be pursued in dealing with subsequent practice: "En continuant de marcher dans cette direction, à quels résultats refinira-t-on pas par aboutir?"[75]

In the war between Italy and Turkey, which began on September 29, 1911, the Porte failed to accord any *délai de faveur* to enemy ships within Turkish ports or entering them ignorant of the outbreak of hostilities. In the decision of the Smyrna prize court, November 7, 1911, the justification for the capture of practically all of the Italian vessels found in Turkish harbors was that they belonged to a type which was destined to remain

[73] "La question de la contrabande" in *R. G. D. I. P.*, XII, 1905. p. 7.

[74] Discussing the danger to peace that a similar situation involving vaster commercial interests might create, Lawrence says: "The freedom of neutrals to carry into the unblockaded commercial ports of belligerents cargoes of provisions for the use of the civil population is indeed of such vital importance to a country like England which imports the major part of its food that the British people would in all probability have undertaken a great war to defend the doctrine by which grain and meat may not be declared contraband unless destined to the army or navy of a belligerent or to a place besieged by the enemy". *Ibid.*, pp. 7–8.

[75] *R. G. D. I. P.*, XI, 1904, p. 362.

within the ports, that their owners could not therefore derive profit from delay, and that the Hague convention upon the subject contemplated real merchant vessels capable of leaving port unless prevented by *force majeure.*[76]

Italy had simply to apply article 243 of her marine mercantile code. This she did by issuing on October 4, 1911, instructions to her port captains. The two articles of these instructions that concern the present matter are the first and third. The first provides:

"Que les navires turcs qui se trouvaient dans les ports au moment de la déclaration de guerre, ou qui y sont arrivés en ignorant cette déclaration soient pourvus d'un sauf-conduit pour rejoindre soit la Turquie, soit leur destination ultérieure." The third leaves indefinite the duration of the *délai:* "Qu'aux navires turcs, dont la relâche est forcée, il soit permis de rester dans les ports le temps nécessaire pour reprendre avec sécurité leur voyage."[77]

Under the terms of these instructions the *Chauki,* a Turkish vessel which had left Gaza before, and reached Tripoli after the outbreak of the war, was held not liable to confiscation.[78]

Turkey disregarded also both her own previous practice and the consensus of international opinion expressed in article 3 of the 6th Hague convention of 1907, since she captured Italian vessels found at sea in ignorance of hostilities.[79]

Italy on the 13th of October, 1911, instructed her prize courts and naval captains to observe the Hague regulation above mentioned.[80] The cases of the *Newa, Sheffield,* and *Sabah* indicate a strict interpretation of the rule of ignorance.[81]

Of general interest was the question whether Article 211 of the Italian code would be applied in case the Turkish Government without making formal announcement of its policy should abstain from the capture of private property under the enemy's

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[76] "Tribunale delle prede di Smirne" in *Rivista di Diritto Internazionale,* Série II, I, p. 146.

[77] "Chronique" in *R. G. D. I. P.,* 21, p. 266, n. 2.

[78] "Cronaca e commento" in *Rivista,* II, I, p. 552, n. 4.

[79] *R. G. D. I. P.,* 21, 1914, pp. 248, 259, and 268.

[80] *R. G. D. I. P.,* 21, 1914, p. 107, n. 3; also in *Rivista,* II, I, p. 562. Instructions "desired" observance of Declaration of London.

[81] *R. G. D. I. P.,* 21, 1914, p. 268, and n. 3; p. 269, n. 1.

flag. This question was answered from the standpoint of law by the Italian prize court in the case of the *Sabah,* in which it was declared that by the terms of Article 211 a positive and formal enunciation within a definite time was required.[82] It was answered for the purposes of the war by the verbal note of the Italian Minister of Foreign Affairs, of October 4, 1911.[83] This communication enumerated the customary list of undoubted contraband, followed the enumeration with a general classification of "les munitions de guerre, les objets d'équipement militaire de tout genre, et en général tout ce qui, sans manipulation, peut servir immédiatement pour l'armement maritime ou terrestre," and laid down the attitude of his government as to capture:

"Le Ministère royal des affaires étrangères a l'honneur de signifier en même temps que, comme le Gouvernment ottoman n'a accompli aucun acte démonstrant son intention d'exempter de la capture les bâtiments de commerce italiens et comme, par contre, des actes de saisie et de capture ont été effectués par le Gouvernment ottoman au préjudice des navires de commerce italiens, le Gouvernment royal, conformément aux dispositions des lois en vigueur et aux principes du droit des gens généralement admis, se réserve la faculté d'exercer son droit de capture et de prise sur les navires marchands ottomans."

On October 12, 1911, Turkey declared that enemy ships and enemy cargoes on board them should be liable to capture but that neutral goods should only be so liable if contraband.[84] In the same month the Porte published a long list of articles which it would consider contraband, including therein grain and provisions.[85] On November 1, 1911, this list was replaced by another identical with that of Italy, and it was announced that the ships which transported contraband of war should be confiscated only if the contraband, by value, weight, volume or freight comprised more than one-half of the cargo.[86]

Italian law and practice in regard to the destruction of merchant vessels accorded with the generally advanced attitude of Italy upon the question of maritime capture. Authorized by

[82] *Ibid.,* p. 246.
[83] *Rivista,* II, I, 1912, pp. 559–560.
[84] *Rivista,* II, I, p. 560.
[85] *Ibid.,* pp. 561–562.
[86] *Rivista,* II, I, p. 562.

Article 14 of the Instructions of October 13, 1911, to destroy a prize only if to conduct it to port would jeopardize the security of the captor ship or the success of naval operations, Italian warships apparently found no such necessity to arise—though concerned in one way or another with some 800 enemy and neutral merchantmen.[87] Her early acquisition of the mastery of the sea left to Italy an easy recourse to the conduct according with law and with the interests of herself and neutrals.

The conduct of maritime operations was attended with almost no important controversies between Italy and neutral powers, whose good-will Italy had every reason to cultivate. We do not come upon the irritating attempts to defeat the spirit of the law of nations by extending the contraband list, by a rigid application of the doctrine of continuous voyage, or by a harsh application of the right of visit and search. The case of the *Carthage* serves to illustrate, however, that Italy was quite ready to stand upon a liberal interpretation of her rights. The destroyer *Agordat* having arrested and conducted to Cagliari the French mail steamer *Carthage,* Marseilles to Tunis, on January 16, 1912, because that vessel was transporting an aeroplane to a French aviator at the latter port, the Italian Government consented to submit the question of the legality of the "capture and temporary seizure" to the Hague Court. The five eminent members of the arbitral tribunal decided that the circumstances did not "constitute sufficient juridical reasons to believe in a hostile destination and consequently to justify the capture of the vessel which was transporting the aeroplane," and that therefore "the Tribunal is not called upon to inquire whether or not the aeroplane should by its nature be included in articles of contraband either conditionally or absolutely, or to examine whether the theory of a continuous voyage should or should not be applicable in this case."[88]

The Balkan Wars of 1912–13 raised no serious issues between belligerents and neutrals so far as maritime operations were concerned. Greece included coal and machine oil in her list of contraband, and the exportation of cottonseed oil and oleo from

[87] *R. G. D. I. P.*, 21, p. 248; p. 269.

[88] "Award" in *A. J. I. L.*, VII, 1913, p. 627; also in *R. G. D. I. P.* XX, 1913, Documents, p. 35.

the United States was somewhat restricted until it was demonstrated that these oils were not of the contraband varieties.[89] Although Turkish shipping decreased in tonnage, the annual decrease in the years of war was not so great as that which occurred in 1914. Turkey's shipping, exclusive of small sailing vessels, decreased from a total of 202,692 tons at the end of 1911, to 133,158 tons at the end of 1914. It fell off 21,000 tons in 1912; 24,000 tons in 1913; and 24,000 tons in 1914. During the year 1915 it just maintained the total reached in 1914.[90] On the other hand, the commerce of Turkey quite considerably increased during the war, as is shown by the following brief table:

Date	Imports	Exports
1910	£ T. 33,382,556	£ T. 18,198,447
1911	37,774,913	22,474,818
1912	43,551,035	23,921,326[91]

The truth is that action against commerce during the Balkan Wars was comparatively of such small importance as to render any analysis unfruitful.[92]

Our examination of European practice has brought us now to the latest period. We have noted that up to 1856 the struggle for neutral rights centered upon the question of immunity of enemy property from capture when transported in neutral vessels. In the succeeding period the value of the rule of immunity for that category of commerce has been severely tested. Belligerents have not hesitated to devise and employ expedients the purpose or tendency of which was to annul the progress signalized at the Congress of Paris. Alongside this unfavorable line of development has appeared the all too meagre account of the acts and efforts of governments which have evidenced the vitality of the principle of immunity by a complete or partial prac-

[89] Schurman, J. G., *The Balkan Wars* (Princeton, 1914), p. 51.

[90] *Hazell's Annual* (London), 1912, p. 343; 1913, p. 350; 1914, p. 300; 1915, p. 289; 1916, p. 278.

[91] *Statesman's Year Book* (London), 1915, p. 1405.

[92] Martens, *N. R. G.* as yet includes no documents relating to the present subject as involved in the Balkan Wars of 1912–13, and no discussion of the conduct of operations against commerce has appeared in the *R. G. D. I. P.*; the *R. D. I.*; the *A. J. I. L.*; or the London *Times*.

tice of that principle. The way should now be clearer to an appreciation of the issues raised in the European War and to conclusions upon the prospect for the ultimate realization of immunity as a principle and in practice.

CHAPTER III

THE ATTITUDE OF THE UNITED STATES TOWARD THE RIGHT OF CAPTURE

The United States, fighting a war for independence from the greatest of maritime powers at a time when the belligerent and neutral worlds were united against England because of her maintenance of the ancient rules of maritime warfare, naturally incorporated into its first treaty, the commercial agreement of 1778 with France, the "twin maxims" of Utrecht.[1] The greater freedom which the first of these principles expressed agreed with the interests and the temper of the new republic since in but one of its subsequent treaties has it included the opposing regulations upheld by the mother country.[2] Treaties of 1782 with the United Provinces,[3] 1783 with Sweden,[4] and 1800 with France[5] stipulated that free ships should make free goods and enemy ships, enemy goods.

Before the last date the United States had made treaties in which the first of the "new" rules, namely, that free ships make free goods, stood alongside of the second "English" rule which provided that neutral goods in enemy vessels should be free from capture. This is true of the treaties of 1787 with Morocco,[6] of 1795 with Spain,[7] of 1796 with Tripoli,[8] and of 1797 with Tunis.[9] It would, therefore, have been impossible to say of the period after 1780 what a defender of England's position toward the Armed Neutrality has written of the preceding

[1] Martens, *Rec.* II, pp. 594, 597.
[2] Jay Treaty; but compare Art. XII of Treaty of 1799 with Prussia quoted *infra*.
[3] Martens, *Rec.* III, p. 439.
[4] *Ibid.*, pp. 568, 572.
[5] *Ibid.*, VII, p. 103.
[6] *Ibid.*, IV, p. 247.
[7] *Ibid.*, VI, p. 143.
[8] *Ibid.*, p. 298.
[9] Martens, *Rec.*, VI, p. 406.

period. Manning, speaking of the absence from the manifesto of the Northern Confederacy of the second principle of the "Dutch system," said: "But never had there been, among Christian powers, a treaty which conveyed the former immunity without also engaging the latter privilege."[10]

It has already been noted that this country did not make it a *sine qua non* of its agreements upon the question of neutral rights at sea that they be guaranteed unconditionally. Professor Moore cites but five treaties in addition to the four above mentioned in which the United States followed out the program of the league of the northern neutrality and set precedents for the practice in the Crimean War, those of 1785 with Prussia,[11] 1805 with Tripoli,[12] 1816 with Algiers,[13] 1828 with Prussia,[14] and 1836 with Morocco.[15] In 1860 the same provisions appeared in a treaty with Venezuela.[16]

The treaty of 1785 with Prussia contained the following article:

> "If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other . . . ."[17]

Benjamin Franklin had tried in vain two years earlier to have the principle of complete immunity embodied in the treaty with Great Britain. As Bentwich says, he was "the originator of the movement in practical politics."[18] He represented a new

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[10] Manning, p. 335.
[11] Martens, *Rec.*, IV, p. 42.
[12] Malloy, W. M., *Treaties, etc., between the United States and Other Powers* (Washington, 1910), II, p. 1788.
[13] Martens, *Nouveau recueil*, V, *Supp.*, p. 6.
[14] *Ibid.*, VII, 2, p. 615.
[15] *Ibid.*, XIII, p. 685; Moore, J. B., *Digest of International Law*, (Washington, 1906), 7, p. 435.
[16] Malloy, II, p. 1845.
[17] Martens, *Rec.* IV, p. 42.
[18] Bentwich, p. 85.

nation with a small navy and unlimited commercial potentialities. In 1785 he was negotiating with Frederick the Great, who derived satisfaction from being regarded as a reformer as long as the reputation cost him nothing. Article XII of the treaty above quoted placed it in the small class of treaties signed up to that time which exhibited especial consideration for neutral rights. Article XXIII, however, is the one which makes the treaty unique; it reads:

"If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance . . . *And all merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be attained and more general shall be allowed to pass free and unmolested;* . . ."[19]

The treaty of 1785 expired by its own limitations in October, 1796. Three years later Prussia and the United States entered into a second treaty, Article XII of which reads:

"Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves or jointly with other Powers alike interested, to concert with the great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and safety of the neutral navigation and commerce in future wars. And if in the interval either of the contracting parties should be engaged in a war to which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves towards the merchant vessels of the neutral Power as favorably as the course of the war then existing may permit, observing the principles and rules of the law of nations generally acknowledged."[20]

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[19] Martens, *Rec.* IV, p. 47. (Italics by the writer).

[20] Martens, *Rec.*, VI, pp. 676–8. This latter section appears to permit of action under the "English Rule" or even of the extreme practice to which the application of the rule of hostile infection led.

Article XXIII remained as in the treaty of 1785 only as far as the section providing for complete immunity, which was excluded in its entirety.[21]

To complete the survey of the three treaties with Prussia it is necessary to quote from that of 1828. Article XII therein provides:

"The twelfth article of the treaty of amity and commerce concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty."[22]

This provision, therefore, includes Article XIII of the treaty of 1799, repeated from that of 1785, stipulating that contraband shall not be confiscable upon the ships of either party, but shall be subject to requisition. It leaves the neutral flag inviolable even for the carriage of contraband, thereby going a step beyond the future Declaration of Paris, but it does not revive the immunity of enemy property provided for by the treaty of 1785.

Under pressure the United States plenipotentiary agreed to Article XVII of the treaty with England of 1794, by which "if any property of an enemy should be found on board such vessel, [of the other party being neutral] that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment."[23] This article expired October 28, 1807,[24] and it has not been renewed; neither do provisions concerning this question appear in any subsequent treaties of the United States with Great Britain.

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[21] *Ibid.*, pp. 686–8. This fact Oppenheim overlooks when he corrects Perels and declares that Article XII of the treaty of 1828 expressly adopts the immunity of private property by renewing the twenty-third article of the treaty of 1799; Oppenheim, II, p. 221, n. 2. Westlake has a similar misstatement; II, p. 129.

[22] Martens, *N. R.*, VII, 2, pp. 619–620. For a convenient source containing the three treaties in English see Niemeyer, *Urkundenbuch zum Seekriegsrecht*, I, pp. 22–34.

[23] Martens, *Rec.*, V, p. 672.

[24] Malloy, I, p. 601, n. A.

Not only, however, has the United States partially sacrificed its doctrine of immunity by consenting to numerous treaties which permit the capture of neutral property in the ships of enemies;[25] but it has introduced into a number of treaties the principle of reciprocity according to which free ships are to mean free goods only in cases where the enemy grants the same privilege to neutrals. The treaty with Spain of 1819 contains an article to that effect. It reads:

"With respect to the 15th article of the same treaty of friendship, limits, and navigation of 1795, in which it is stipulated that the flag shall cover the property, the two high contracting parties agree that this shall be so understood with respect to those Powers who recognize this principle; but if either of the two contracting parties shall be at war with a third party, and the other neutral, the flag of the neutral shall cover the property of enemies whose Government acknowledge this principle, and not of others."[26]

The same provision occurs in the treaty with Colombia of 1824,[27] in that with Central America of 1825,[28] and in other treaties as late as that of 1871[29] with Italy, and that of 1887 with Peru.[30] The reciprocity provision occurs both in treaties which confer immunity upon neutral property in enemy ships and in treaties which permit its capture and condemnation. In

[25] For list of United States treaties containing the so-called Dutch principles see Moore, *Digest*, VII, p. 436; also in Hall, *International Law*, 6th ed. p. 693, note. Hall is in error in including our treaty of 1854 with Russia; see Malloy, II, p. 1520.

[26] Martens, *Rec., Supp.*, IX, Pt. 1, p. 343; Malloy, II, p. 1656. Professor Moore states that a similar stipulation existed in the treaty with France of 1778. *Digest*, VII, p. 436. The writer is unable to discover such a stipulation in the treaty. Article XXIII provides: "It shall be lawful for all and singular the subjects of the Most Christian King, and the citizens, people, and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandizes laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King or the United States. . . . And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted". See Martens, *Rec.* II, p. 597.

[27] Martens, *N. R. Supp.*, X, 2, p. 994.

[28] *Ibid.*, p. 832.

[29] Martens, *Nouveau recueil général*, I, p. 57.

[30] *Ibid.*, XXII, p. 63.

six treaties of the United States: those with Russia of 1854;[31] the Two Sicilies, 1855;[32] Peru, 1856;[33] Bolivia, 1858;[34] Hayti, 1864;[35] and the Dominican Republic, 1867,[36] reciprocity is demanded, but in milder terms. The treaty of 1854 with Russia by Article III provides:

"It is agreed by the High Contracting Parties that all nations which shall or may consent to accede to the rules of the first Article of this Convention [that free ships make free goods] by a formal declaration stipulating to observe them, shall enjoy the rights resulting from such accession as they shall be enjoyed and observed by the two Powers signing this convention."

Article XIX of the treaty of 1864 with Hayti engages the contracting parties "to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them as permanent and immutable." The same provision occurs in the treaty with the Dominican Republic, 1867, Article XV.

Secretary of State Madison declared the position of the United States to Mr. Armstrong, Minister to France, on March 14, 1806:

"The United States cannot, with the same consistency as some other nations, maintain the principle [that free ships make free goods] as already a part of the law of nations, having on one occasion admitted and on another stipulated the contrary. They have, however, invariably maintained the utility of the principle, and whilst as a pacific and commercial nation they have as great an interest in the due establishment of it as any nation whatever, they may with perfect consistency promote such an extension of neutral rights."[37]

His references are undoubtedly to the treaties of 1799 with Prussia and of 1794 with Great Britain.

The reply of Mr. Jefferson, when secretary of state, to M.

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[31] *Ibid.*, XVI, 1, p. 572.
[32] *Ibid.*, p. 570.
[33] *Ibid.*, XVII, 1, p. 191.
[34] Malloy, I, p. 114.
[35] *Ibid.*, p. 926.
[36] *Ibid.*, p. 408.
[37] *MS. Inst. U. S. Ministers*, VI, p. 322; Moore, *Digest*, VII, p. 440. It may be doubted whether Madison could have named a single state whose practice over a considerable period of time justified its maintenance of the principle as a rule of law.

Genet, July 24, 1793, which has become a classic for the expression of the American view, is but one of a large number of declarations by American officials, judges, and publicists[38] which agree in supporting the *Consolato del Mare* as the common law on the subject of capture, to be observed invariably in the absence of treaty stipulations in a contrary sense:

"I believe it cannot be doubted, but that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle, I presume, the British armed vessels have taken the property of French citizens found in our vessels, in the cases above mentioned, and I confess I should be at a loss on what principle to reclaim it. It is true that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretense of having enemy goods on board, have, in many instances, introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods and friendly bottoms friendly goods—a principle much less embarrassing to commerce and equal to all parties in point of gain and loss; but this is altogether the effect of particular treaty, controlling, in special cases, the general principle of the law of nations, and, therefore, taking effect between such nations only as have so agreed to control it."[39]

It may be remarked that the United States was at this time a neutral. To emphasize the adherence of the United States to the common law when itself at war and to overlook its admission of the same principles when neutral would be unscientific. Continuously following the practice of older nations in its wars, the United States has as consistently maintained the value of a free neutral flag. Changing circumstances have not altered the tone of official directions to representatives abroad. In 1816 Secretary of State Monroe maintained the desirability of obtaining a treaty with England which should protect enemy goods in United States bottoms from capture, although "the importance of this rule is much diminished to the United States by

[38] *e. g.*, Kent, James, *Commentaries on American Law*, Eighth ed. (New York, 1854), I, p. 126: "But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is a clear and well settled principle of the law of nations." See also Marshall's opinion, *The Nereide*, 9 Cranch, 388; Scott, *Cases*, p. 885.

[39] *American State Papers*, Foreign Relations, I, pp. 166–167.

their growth as a maritime power, and the capacity and practice of their merchants to become the owners of the merchandise carried in our vessels." He based his opinion upon the fact that the newer rule "would prevent vexatious seizures by belligerent cruisers, and unjust condemnations by their tribunals from which the United States have sustained such heavy losses."[40]

It has already been said that in ten of its treaties the United States has stipulated unconditionally for the rule free ships, free goods, while in others it has agreed to the accompanying enemy ships, enemy goods. Chief Justice Marshall in the case of *The Nereide* took note of this fact after he had summarized a similar situation in the treaties of foreign states:

"Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods, and that friendly goods shall be safe in the bottom of an enemy. It is, therefore, clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other."[41]

The opinion in this case, original with Marshall, is evidence that if American courts followed English decisions in the absence of treaty clauses, they were quite as careful to take full account of such clauses where they existed.

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[40] Monroe to Adams, May 21, 1816, *MS. Inst. U. S. Ministers,* VIII, p. 61; Moore, *Digest,* VII, p. 441.

[41] 9 Cranch, 388 ff., Scott, *Cases,* p. 887. Marshall in the same case holds that neutral property otherwise immune from capture is not rendered confiscable by the fact that the merchant vessel transporting it is armed: "It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a dictum should be found in the books pointing to such construction." He based his opinion upon the right of a neutral to transport his goods in the ship of a friend and refused to admit that the "differences in the degree of capacity" of the carrier to avoid capture and to prevent search could be regarded as restricting the complete right of the neutral. His opinion received confirmation in the case of *The Atalanta* (1818), 3 Wheaton, 409. It disagreed with that in the English case of *The Fanny,* 1 Dodson, 443.

In 1823, the year in which France, intervening in Spain, temporarily dispensed with the right of capture at sea, President Monroe through Secretary of State Adams instructed American representatives in Europe to urge the abolition of capture upon the governments to which they were respectively accredited. France was inclined to accede to the proposition and Russia expressed sympathy toward it. Great Britain refused to entertain or discuss the proposal, which accordingly fell to the ground.

In 1826, in the instructions to the delegates from the United States to the Panama Congress, Secretary of State Henry Clay pointed out that though motives of self-interest had grown less important, this Government still maintained its attitude looking toward freeing private property from the danger of capture at sea, as it had already been freed on land.[42]

President Pierce took immediate advantage of the Franco-British agreement of 1854 to send identic propositions to the governments of Europe and America for conventions which should incorporate the principles of immunity for neutral goods on enemy vessels and of enemy goods on neutral vessels.[43]

The United States had not, however, considered it possible to separate the two questions of privateering and capture in 1785 nor in 1823, and it acted consistently with its previous attitude in its refusal to accept the abolition of privateering as long as the property of its citizens in time of war should remain liable to confiscation. The United States was in the embarrassing situation of being unable to adhere to the rules which it had urged upon other governments. President Pierce had pointed out in his annual message in 1854 the danger that would attend a renunciation of privateering by a Power with a large mercantile fleet and a small navy.[44] The arguments and the facts were elaborated by Secretary of State Marcy on July 28, 1856 in a communication to Count Sartiges, the French minister at Washington, who had extended an invitation to this Government to

[42] Butler, C. H., "Immunity of Private Property" in *Report of 18th Conference of the International Law Association* (London, 1900).

[43] *Annual Message*, December 4, 1854, Richardson, V, p. 275. For results of this action see Ch. II of the present discussion.

[44] Richardson, V, p. 276.

adhere to the Declaration. In his reply Secretary Marcy offered to do so if the first article of the Declaration should be amplified so as to provide that "the private property of subjects or citizens of any one of the belligerent powers shall not be subject to seizure by the vessels of the other unless it consist of contraband of war."[45] Russia promised to support this proposal if it should become "the subject of deliberation in common among the Powers";[46] France, Prussia, Holland, and Sardinia were inclined to favor it;[47] the opposition of the British Government prevented a reply from that country until, upon the accession of Buchanan to the presidency, negotiations were ordered suspended, and they were not resumed during his term of office.[48] Yet in 1858 the treaty of the United States with Bolivia was so framed as to admit of a later amendment abolishing the right of capture.[49] And in 1859 the Department of State announced to the great Powers that:

"With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established, and they maintain that belligerent property on board a neutral ship, is not liable to capture; and from existing indications they hope to receive the general concurrence of all commercial powers in this position. . . . It is not necessary that a neutral power should have announced its adherence to this declaration in order to entitle its vessels to the immunity promised. Because the privilege of being protected is guaranteed to belligerents, co-parties to that memorable act, and protects their property from capture wherever it is found on board a vessel belonging to a nation not engaged in hostilities . . . such an immunity withheld from this country would in fact operate as a premium, granted to other nations, and would be almost destructive of that important branch of our national industry, the carrying trade."[50]

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[45] *British and Foreign State Papers*, 55, pp. 589–599.

[46] *MS. Inst. Prussia*, XIV, p. 239; Moore, *Digest*, VII, p. 566.

[47] *MS. Inst. Portugal*, XIV, p. 185; Moore, *Digest*, VII, p. 567. For replies to Marcy's proposal and general discussion of the effect it produced in foreign countries see Niemeyer, *Urkundenbuch*, I, pp. 69–121.

[48] *MS. Inst. Great Britain*, XVII, p. 71; Moore, *Digest*, VII, p. 567. M. Laveleye quotes from Secretary Marcy's note extensively and says that the United States had considerable justification for refusing to accept the suppression of privateering, if the larger and only logical principle of the suppression of the right of capture were not admitted concurrently, *R. D. I.*, VIII, 1875, p. 566.

[49] Malloy, I, p. 114.

[50] *MS. Inst. France*, XV, 455; Moore, *Digest*, VII, p. 450.

On April 24, 1861, Secretary Seward sent to the ministers of the United States in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy, Denmark, and Holland drafts of conventions according to the terms of which this Government would consent to adhere to the Declaration of Paris.[51] The accompanying notes stated that

"the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals, not contraband, should be exempt from seizure and confiscation by national vessels in maritime war." But as "Europe seems once more to be on the verge of quite general wars," and as "a portion of the American people have raised the standard of insurrection and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States, prudence and humanity combine in persuading the President under the circumstances, that it is wise to secure the lesser good offered by the Paris Congress, without waiting indefinitely in hope to attain the greater one . . ."

President Lincoln's proffer of adherence was prompted by his desire that foreign powers should treat the Confederate privateers as pirate ships. When Great Britain and France recognized the "insurgents" as "belligerents," and declared that it would be essential to introduce into their conventions with the United States a declaration of non-intention to become implicated in the internal conflict in the latter country, Secretary Seward terminated negotiations, expressing the hope that within the near future they might be reopened with increased prospect of success.[52] Six years later as circumstances were adjudged unfavorable the same Secretary of State declined to submit the Marcy amendment to the consideration of the powers, though urged to do so by the Italian Government.[53]

In the War of 1812 there was no accepted rule among the nations which protected neutral property in enemy ships, so that

[51] Moore, *Digest*, VII, pp. 570–573.

[52] For the negotiations of the United States concerning the Declaration of Paris see Moore, *Digest*, VII, pp. 561–583. Mr. Seward interpreted the proposed qualifying declaration to mean that the powers "should be at liberty to recognize the United States rebels as a maritime power equal under the treaty of Paris to the United States themselves". *MS. notes to Italy*, VI, p. 344, 1867; Moore, *Digest*, VII, p. 467.

[53] *MS. Inst. Prussia*, XIV, p. 504; Moore, *Digest*, VII, p. 467.

the instructions of the United States Government to its naval officers to destroy enemy merchant vessels could be carried into effect without placing the Government under obligation to pay the large indemnities which present-day evasion of the spirit of the rule above mentioned would seem to entail. In the War of the Rebellion, Confederate armed vessels were careful to respect the ships of neutrals, but they sank and burned the ships of enemies without scruple. The practice of the Southern Confederacy showed it to be undeniable that the power to destroy the vessels of enemies before adjudication in a court of prize was extremely dangerous in view of the latitude within which a belligerent could interpret "necessity."

The United States Government was not bound in the Civil War to observe the Declaration of Paris. The goods of enemies in neutral vessels might therefore have been captured and confiscated without necessity for the development of the principle of continuous voyage which, as we have already seen, had been applied to a slight extent in the Crimean War. The Government of the United States chose, however, to observe the Declaration.[54]

The cases of the *Bermuda*,[55] the *Stephen Hart*,[56] the *Springbok*,[57] and the *Peterhoff*[58] are familiar to all students of the history of the doctrine of continuous voyage. Chief Justice Chase handed down the decisions in the first two cases together. The cargoes of both were condemned in their entirety, part as being contraband ostensibly destined to neutral ports, but actually intended for belligerent ports, the remainder as being consigned to the same persons as were the real consignees of the contraband goods. The ships were also condemned on the ground that the contraband shipment was made with the consent of the owners, given in fraud of belligerent rights.

The cargo of the *Springbok* was condemned for attempt to run the blockade, the court through the Chief Justice declaring its belief that the owners of the cargo intended that it should

[54] Moore, *Digest*, pp. 570–574.
[55] Wallace, III, pp. 514–559.
[56] *Ibid.*, pp. 559–560.
[57] *Ibid.*, V, pp. 1–28.
[58] *Ibid.*, pp. 28–62.

be transshipped at Nassau into some vessel more likely than the *Springbok* to succeed in reaching safely a blockaded port, ". . . the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."[59] The ship was released as having been engaged in a *bona fide* voyage to the port of Nassau. It is of great interest to note that in this case the court clearly laid down the application of the continuous voyage doctrine to any sorts of cargoes when their ultimate destination was a blockaded port. Although the Chief Justice takes note of the fact that only a small part of the cargo is absolute contraband, he immediately says:

"But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade."[60]

The *Peterhoff* case resembled the cases above discussed in that the vessel was neutral and was carrying a mixed cargo of contraband and non-contraband goods between neutral ports, under circumstances which indicated that at least the contraband was intended to reach persons within the Confederacy. It differed from those cases in that the second part of the transport was to be accomplished overland. Instead of transshipping the cargo at some West Indian port, thence to take the chance of capture in attempting to run the blockade of the Southern ports, the consignors intended to unload it at the Mexican port of Matamoras, across the Rio Grande from Brownsville in Texas.

The Chief Justice condemned the contraband goods and those which belonged to the owner of the contraband. The ship and the remainder of the cargo were released. The court pointed out that the Rio Grande was a boundary river, preserved by treaty from being blockaded. Hence "neutral commerce with

[59] Wallace, V, p. 28.
[60] *Ibid.*, p. 26.

Matamoras, except in contraband, was entirely free."[61] As Brownsville lies further up the river than blockading vessels can navigate, the question before the court narrowed down to this: Did "an ulterior destination to the rebel region which we now assume as proved [affect] the [neutral] cargo of the *Peterhoff* with liability to condemnation"?[62]

The answer of the court was an emphatic negative. The principles laid down in the *Bermuda* and similar cases were reaffirmed, but by reference to precedent in the cases of the *Stert*,[63] the *Ocean*,[64] and the *Jonge Pieter*,[65] the "lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation" was established.[66] This portion of the opinion is of practical value to those who are today studying the embargo which Great Britain has placed over all sorts of goods entering neutral ports near to Germany, when the goods cannot be proved to be for consumption within the neutral countries. The learned Chief Justice said:

"Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such a trade, with unrestricted inland commerce between such a port and the enemy's territory, undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence."[67]

On another page these "lessons" are thus summarized:

". . . contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles

[61] *Ibid.*, p. 54.
[62] *Ibid.*
[63] Robinson, IV, p. 65.
[64] *Ibid.*, III, p. 297.
[65] *Ibid.*, IV, p. 79.
[66] Wallace, V., p. 56.
[67] *Ibid.*, p. 57.

not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras."[68]

These four decisions may be thus epitomized: Non-contraband goods, being transported in neutral ships toward neutral ports, may be captured and confiscated if their ultimate destination may be presumed to be a blockaded port; such goods may not be confiscated when the continuance of the voyage is to be inland. The Supreme Court advanced a considerable distance toward the abrogation[69] of the rule of free ships, free goods, but it did not go the whole way.

"The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exceptions of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."[70]

This article of the treaty between the United States and Italy of February 26, 1871, marks it as the only international agreement now in effect that provides for complete immunity of non-offending private property. It is the logical result of the identical tendencies of the two countries in this respect but its importance can hardly become great in practice. Its significance lies in its attestation that the principle it embodies is worthy of a place in the agreements of two important powers.

In 1880 Secretary of State Evarts notified the Government of Peru, at war with Chile, that the treaty of 1870 which provided for the freedom of the neutral flag covered the cases which Peru

[68] *Ibid.*, p. 59.

[69] See article by Baldwin, S. E., "The 'Continuous Voyage' Doctrine During the Civil War and Now," in *A. J. I. L.*, 9, 1915, pp. 793–802.

[70] Martens, *N. R. G.*, I, p. 57.

was threatening to exempt from its operation.[71] Chile was exporting cargoes of nitrate from a section of the Peruvian coast which she had occupied and which Peru refused to regard as beyond her jurisdiction. Mr. Evarts declined to admit the possibility of legal seizures of American vessels carrying such nitrate.

"In the recent war with Spain we necessarily enforced the rule of capture, as there was no response to our proclamation that we would not resort to privateering; and, as the implied retention of that right by Spain rendered our commerce subject to capture, we were bound to reserve and exercise every right of war as against our enemies."[72]

Spain, however, failed to make any captures of American merchantmen and it would seem that the United States allowed to pass an excellent opportunity for putting into operation the liberal doctrine it has been urging for more than a century.[73]

On April 26, 1898, President McKinley declared that the neutral flag should cover enemy goods not contraband, and that neutral goods, except contraband, should not be liable to confiscation under the enemy's flag.[74] Three days earlier Queen Maria Cristina issued a decree, Article III of which read:

"Notwithstanding that Spain is not bound by the declaration signed in Paris on the 16th of April, 1856, as she expressly stated her wish not to adhere to it, my government, guided by the principles of international law, intends to observe and hereby orders that the following regulations for maritime law be observed:

"(a) A neutral flag covers the enemy's goods except contraband of war.

"(b) Neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag."[75]

The peculiar situation of war between the two more important of the three Powers that had not signed the Declaration of Paris provided an opportunity for demonstrating the attitude of both

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[71] Martens, *N. R. G.*, I, p. 97.

[72] Butler, C. H., "Freedom from Capture of Private Property at Sea," in *North American Review*, 168, 1899, p. 57.

[73] Two considerations hindered such action: (1) the comparative weakness of the Spanish navy was not realized and (2) no preliminary arrangement had been effected regarding prize money.

[74] *Foreign Relations of the United States*, 1898, p. 772.

[75] *Ibid.*, p. 774.

Powers to the four rules of that Declaration.[76] The action of Spain and the United States afforded striking evidence in support of the legal character of those famous rules.

The important cases in American prize courts arising out of this war involved the question of blockade.[77] The case of the *Carlos F. Roses* involved the determination of the enemy or neutral character of the cargo of a Spanish vessel, the court basing its decision upon the President's proclamation.[78] In the case of the Spanish steamer *Rita,* condemned as enemy property, the court referred to the efforts of the American Government toward a milder treatment of privately owned ships and cargoes.[79]

Article IV of the President's proclamation already cited extended to Spanish vessels in American ports a thirty day period for loading and departing, and guaranteed immunity from capture if such ships were able to furnish the proper papers. The Spanish decree afforded but five days and did not specify for safety from capture of vessels leaving within that time and met on the high seas. And whereas this Government guaranteed immunity to Spanish merchant vessels which, prior to April 21, 1898, had sailed from any foreign port bound for any port or place in the United States, the immunity to operate not only while such vessels were proceeding toward and discharging cargo in such port or place, but also while they were proceeding toward any unblockaded port, after leaving the port of discharge, Spain made no mention of similar action toward the vessels of this country.[80]

In his annual message, December, 1898, President McKinley asked for authority "to correspond with the governments of the

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[76] Spain and Mexico definitely adhered to the Declaration of Paris in 1908 and 1909 respectively; see Ch. II of this study.

[77] Benton, E. J., *International Law and Diplomacy of the Spanish-American War* (Baltimore, 1908), p. 178, notes that three Spanish merchantmen were destroyed by a cruiser of the United States, but that the destruction was justified by the authorities on the grounds that the ships were transports.

[78] 177 U. S. 655; Scott, *Cases,* p. 637.

[79] Moore, *Digest,* VII, p. 470.

[80] The American proclamation did not provide for the loading of such vessels nor for immunity for Spanish vessels which were proceeding toward neutral ports, having begun their voyages prior to April 21, 1898. See the case of the *Buena Ventura,* 175 U. S. 384.

principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers."[81] In spite of our rapid conquest of the seas, American commerce had lost heavily through the rise of insurance rates.

". . . one well known shipping firm in New York City paid during the brief period of war over sixty thousand dollars in war premiums, and the aggregate amount of such premiums, according to shippers well informed as to the actual facts, far exceeded the value of all the Spanish merchantmen captured by our Navy under the general rules of maritime warfare."[82]

As the major portion of the enlarged premiums was paid to foreign firms the President had good foundation for his statement that: "The experience of the last year brings forcibly home to us a sense of the burdens and waste of war." Congress did not take final action upon resolutions of both houses in the sense urged by the President's message, but it removed an important obstacle to later freedom of action by abolishing prize money, a step which the Navy did not hinder.[83]

The attitude of Congress encouraged President McKinley and Secretary Hay to instruct our representatives to the First Hague Conference to lay before that body the claims of the principle of immunity. There, as the subject was not upon the program of the Conference, the efforts of the American delegation headed by Honorable Andrew D. White succeeded only to the extent that the Conference listened to the memorial and expressed the wish that the question be referred to a subsequent Conference for consideration.[84]

In 1903 President Roosevelt in his annual message advocated the immunity of non-offending private property at sea as a measure necessary to bring maritime warfare to the standard

[81] *Senate Journal*, 55th Congress, 3rd Session, p. 4 ff.

[82] Butler, C. H., "Freedom from Capture of Private Property at Sea" in *N. A. R.*, 168, 1899, p. 55.

[83] *United States Statutes at Large*, 55th Congress, 30, c. 413, p. 1007.

[84] *Foreign Relations*, 1899, pp. 511–520; Scott, J. B., *Hague Peace Conferences* (Baltimore, 1909), I, pp. 65, 699–700; II, pp. 9, 24, 71, 79; *La Conférence Internationale de la Paix* (The Hague, 1899), pt. I, pp. 31–33.

of humanity practiced in war on land. Congress accordingly, by resolution, declared it to be

"desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."[85]

At the Second Hague Conference this Government crowned its continuous record of agitation for immunity by instructing its delegates to submit the question to the Conference.[86] The Russian program of April 12, 1906 included the subject.[87] The consideration of the reform was initiated on June 28, 1907 by an address of Mr. Joseph H. Choate in which the record of international theory and practice in the preceding century was outlined and discussed.[88] The proposition of the United States, the most sweeping of the ten offered to the Conference, was:

"The private property of all citizens or subjects of the Signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said Signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers".

The delegations of Austria-Hungary, Brazil, China, Italy, Norway, and Sweden expressed adherence to the American proposal. Those of Germany, Portugal, and Russia expressed the desire to see a concurrent determination of the questions of contraband and blockade. Great Britain's delegates declined to consider immunity unless a general agreement to respect private property would lead to a reduction of armaments. Argentina and Colombia desired to see capture maintained. When the vote was taken, eleven states of the forty-four did not respond,

[85] *Congressional Record*, 58th Cong., 2nd Sess., Apr. 28, 1904, p. 58.
[86] Scott, *H. P. C.*, II, pp. 192–194.
[87] *Ibid.*, pp. 176–177.
[88] *La deuxième conférence internationale de la paix* (The Hague, 1907), *Actes et Documents*, III, pp. 766–779.

twenty-one declared for and eleven against the proposition, while one state abstained from voting. The Commission, therefore, was unable to present it as a convention for the consideration of the Conference.[89]

The record of fact is distinctly creditable to the United States. Compelled by circumstances beyond its control to act upon the ancient rules of prize, it has stood alone amongst governments in making it a feature of its policy in all the changing conditions of its commercial and naval power to urge upon other states the complete exemption of private property at sea from capture, always excepting cases of contraband and blockade. It has taken a leading part in the development of the law of capture to its present status and has consistently evidenced its desire to initiate what appears to it the logical consequence of the steps so far taken.

[89] *Ibid.*, I, pp. 245–250.

CHAPTER IV

THE THEORY OF IMMUNITY

The literature of international law is rich in exposition and argument upon the subject of respect for private property at sea. As Boeck has written:

"On le voit donc: le temps est dès longtemps passé où quelques voix timides et isolées s'élevaient en faveur de l'inviolabilité de la propriété privée sur mer. Les partisans de cette grande cause, qui semble maintenant gagnée, s'appellent aujourd'hui légion; leur opinion est devenue l'opinion générale et presque universelle".[1]

As there is needed a foundation for a proper understanding of the attitudes which have been and are being taken by the important states toward this question, it will be useful to distinguish the main lines of opinion that have been developed by publicists, commercial bodies, and statesmen, and to examine the proposals that have been put forward upon the basis of such opinions.

A. The Theory and its History

1. Introduction

Not until the middle of the eighteenth century was a voice raised in support of the principle of immunity. Previous writers had been content to state the law with varying degrees of strictness but with substantial agreement upon the central issue. Albericus Gentilis contended that the captor should be liable for the freight due to the neutral carrier from the enemy shipper.[2] Grotius admitted the propriety of the confiscation of

[1] Boeck, p. 514.
[2] *Hispanicae Advocationis*, 2nd ed. (Amsterdam, 1661), I, c. 28.

neutral ships carrying enemy goods on condition that the captain or owner of the ships was cognizant of the fact that they were enemy property. But he maintained the rule of the *Consolato* as to freedom of neutral goods in an enemy ship.[3] His agreement with the attitude of the times is illustrated by his quotation from Cicero: "Neque est contra naturam spoliare eum, si possis, quem honestum est necare."[4] With Grotius may be ranged his followers, Zouch,[5] Loccenius,[6] and Pufendorf,[7] all basing an adherence to the main doctrines of the *Consolato del Mare* upon a belief in their equitable character. Molloy[8] and Heineccius,[9] writing in 1682 and 1721 respectively, agree with the earlier publicists. Bynkershoek phrases his interpretation of the law succinctly: "Cape, sipotes, quodcunque est hostis tui, sed mihi redde quod meum est, quia amicus tuus sum, et impositione rerum mearum nihil sum molitus in necem tuam;" and as regards enemy property: "quid, inquies, dubitatis, cum recte occupem, quicquid hostium est?"[10] Bynkershoek held the matter of the knowledge of the neutral owner or captain that he was carrying enemy goods to be foreign to the legal question.[11] Finally, he justifies the capture of enemy property on the ship of a neutral as a logical following out of the right of stoppage. If the latter was legal, and to his mind it was legal, there remained no ground for asserting that to take the goods of an

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[3] Kleen, *Lois et usages de la neutralité*, II, p. 169.

[4] *De Jure Praedae Commentarius* (1604), c. IV, p. 45; quoted by Boeck, pp. 398–399. Grotius retains the same doctrines in his main work, *De Jure Belli et Pacis* (Whewell's edition, Cambridge, 1853) III, c I, note E and c. VI, sec. 6. For refutation of the arguments upon which Grotius rests his opinions see Bluntschli, *Das Beuterecht im Kriege und das Seebeuterecht insbesondere* (1878), pp. 103–111; also in *R. D. I.*, X, (1878) p. 60 ff.

[5] *Juris et Judicii Fecialis* (1650), edited by T. E. Holland, (Washington, 1911), II, p. 39.

[6] *De Jure Maritimo et Navali* (1651) II, c. 4, sec. 11; cited by Manning, p. 286.

[7] *Of the Law of Nature and Nations* (Engl. Tr. Oxford, 1710), lV, 4, sec. 14; VIII, 6.

[8] *De Jure Maritimo et Navali* (1682) I, c. 1, sec. 18; cited by Manning, p. 287.

[9] *De Navibus ob Vecturam Vetitarum Mercium Commissis*, (1721), c. 11, sec. 9; cited by Manning, p. 288.

[10] *Quaestionum Juris Publici Libri Duo* (Leyden, 1737) I, c. 13.

[11] Kleen, II, p. 169, n. 2.

enemy from the ship of a friend was to offer unjustifiable violence to the ship.[12]

"This judgment of Bynkershoek, besides its own intrinsic value is remarkable from the manner in which he anticipates the exact objections made by some of the modern claimants for additional privileges to neutrals. To their demand that a ship should be considered as part of the State to which she belongs, he replies in a manner that makes it surprising that such a fallacy should have been reasserted after such a refutation."[13]

The German writer Wolf published in 1749 a work entitled *Jus Gentium Methodo Scientifica Pertractatum*[14] in which an argument was directed toward the limitation of booty but no objection was uttered against capture.

The relevant facts and the law of the famous Silesian Loan Controversy have been sufficiently outlined in the first chapter of this discussion. Its interest lies in the claim put forward by the Prussian memorialists as a matter of legal right, namely, that the neutral flag saved the enemy cargo, not contraband, from confiscation. This claim was made at a time when both strict legalists such as Bynkershoek, and moralists like Heineccius were asserting that by the law of nations the capture of enemy goods in neutral ships could not be attacked. The document of Prussia was defective in its statement of law and fact. The declaration that a right to any trade entailed a right to all trade is unlikely ever to square with practice; the proposition that a neutral ship was neutral territory had already been proved unsound; the statement that no treaty had ever been

[12] *Quaestionum*, I, c. 14; see Manning, pp. 290–291. Bynkershoek contended that if an examination of the ship's papers revealed the presence of enemy property, such property might be captured.

[13] Manning, p. 291. The same author also stresses the assertion that Bynkershoek, "a Dutch jurist, writing in Holland, president of the senate of Holland, and in the height of his reputation", replied to the contentions and against the interests of his own countrymen that the treaties containing new rules of prize formed not the law but the exceptions to it. Kleen, p. 170, says of the arguments of Bynkershoek regarding the territorial character of a merchant ship: "Par ces mots, Bynkershoek a encouragé le système, suivi après lui par les partisans de la Règle du Consulat, d'excuser une violation par une autre violation: celle de la souveraineté du pavillon".

[14] Manning says, p. 39: "Wolf is now principally known through the means of his disciple and abridger, Vattel". And see Westlake, II, p. 129.

concluded beween maritime powers which contained the principles maintained by the British reply was inexact. The memorial was significant in that it voiced not law but the interest of neutrals; that the memorialists considered the treaties by which the flag covered the cargo as of sufficient number and weight to warrant a demand of right.[15]

Vattel, in 1758, sustained the rules of the *Consolato*.[16] As regarded neutral goods damaged or detained through the capture of an enemy ship, no damages should be paid because "the loss sustained by the neutrals on this occasion is an accident to which they exposed themselves by embarking their property in an enemy's ship", an argument which has been extended in order to justify the destruction of neutral goods carried in an enemy ship provided the ship itself be legally destroyed.

Moser agreed with the interpretation of the common law of the sea which confiscated enemy goods upon neutral vessels but, in view of the actual confusion of practice regarding neutral goods on enemy vessels, he was unable to give his authority either to their capture or their immunity.[17]

With the publication in 1759 at the Hague of Hübner's *De la Saisie des Bâtimens Neutres, etc.*, the first noteworthy protest was raised against the confiscation of enemy goods on neutral ships. While regarding search as an unquestionable right, he argued that neutral ships, being part of neutral territory, were competent to protect enemy goods not contraband, neutral owners of transports not being parties to the contest. Hübner was not attacking the principle of the right of stoppage but was restricting its application to the discovery of contraband. He was attacking the idea that neutral shipmasters or owners were guilty of an attempt to assist the belligerent whose goods they carried and was attempting to replace it with another to the effect that a neutral had a right to carry goods to an enemy provided he did not carry contraband. Hübner's argument is confused by his use of the analogy between a neutral ship and

[15] For the British viewpoint see Manning, pp. 292–298.

[16] *The Law of Nations*, edited by Chitty, J., (Philadelphia, 1883), III, c. 7, secs. 115, 116.

[17] *Versuch des neuesten europäischen Völkerrechts etc.* (1780) XX, c. 2. secs. 33–34; cited by Manning, pp. 307–308.

neutral territory. His main thesis, however, is sustainable on the ground of neutral right, always provided the facts warrant regarding the right as established, a situation which assuredly had not been developed by 1759.[18]

In the same year Lord Liverpool's *Discourse on the Conduct of Great Britain in Respect to Neutral Powers during the Present War* furnished an adequate reply to Hübner's attempt to wipe out previous theory and practice. Basing his work upon Grotius and Bynkershoek, Jenkinson argued, upon the evidence in the use of the right of search, that the dominion of nations does not extend over the ocean, and drew the conclusion that neutral ships had no capacity to protect enemy goods.

Lampredi admitted the desirability of a general agreement upon the inviolability of the neutral flag but, recognizing the improbability of the reform being accomplished, and believing that the neutral suffers only in small degree, since he gets his freight, he preferred to advocate that the rule of capture be maintained. Lampredi's position was somewhat equivocal since he held that free enemy goods would mean the prolonging of war.[19] He draws from Kleen this question: "Pourquoi la désirer, si comme le pretend Lampredi, l'application en ferait retomber sur les neutres la responsabilité de la prolongation de la guerre et de son effusion de sang?"[20] Lampredi regarded the legality and justice of the capture of enemy goods as beyond question and strongly repudiated Hübner's argument as to territoriality. His argument in its entirety shows the influence of his knowledge of past general theory and practice in conflict with a natural bias toward greater freedom for the commerce of his own small, normally neutral country.

G. F. de Martens, whose *Droit des gens* appeared first in 1788, and Klüber, writing under the same title in 1819, followed Hübner in resting their opposition to the capture of enemy

[18] *Passim;* see Manning, pp. 299–305.

[19] *Del Commercio dei Popoli Neutrali in Tempo di Guerra* (1788) c. X, XI; cited by Phillimore, R., *International Law* (Philadelphia, 1857) III, p. 246.

[20] Kleen, II, p. 171.

property on neutral ships upon the territorial analogy.[21] Kent simply stated the practice of American courts to be based upon the recognition of the legality of the English rule.[22]

The eighteenth century thus had witnessed the struggle between the advocates and the opponents of the *Consolato* rule. The principle consecrated at Utrecht that "free ships" should make "free goods" had received energetic if not widespread partisanship. It had been incorporated as the principal plank in the platforms of the Armed Neutralities of 1780 and 1800. Although not advanced to effectual standing in the law of nations until 1856, in the minds of European theorists the principle that the flag covers the goods was established much earlier. "Après l'époque de la Neutralité armée, ce ne sont guère, en Europe, que des publicistes anglais, qui ont tâché de légitimer la Règle du *Consulat.*"[23] The succeeding century developed the arguments for and against complete immunity. Though writers up to the Declaration of Paris took incidental occasion to support the new as opposed to the old rule, their principal concern lay with the justice and expediency of the wider reform which constitutes the present subject. The first attempt to evaluate immunity and to present the question in such form as to induce further consideration of it was made by the Abbé de Mably in his *Droit public de l'Europe fondé sur les traités.*[24] This work first published in 1748, directed its main attack against the practice of privateering, which in the circumstances of the times was equivalent to a protest against capture as such. It was asserted that the interdiction of enemy commerce reacted seriously upon the home country. The practice of private capture was con-

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[21] De Martens, G. F., *Précis du droit des gens* (New edition, Paris, 1831), II, pp. 261–262; Klüber, J. L., *Droit des gens* (New edition, Paris, 1861), pp. 381–404.

Martens in his *Essai concernant les armateurs, les prises, et surtout les reprises* characterizes the practice of depriving enemy subjects of their ships and cargoes as barbarous, c. 1, sec. 6, pp. 37–38; quoted by Boeck, p. 412.

[22] *Commentaries,* I, p. 136.

[23] Kleen, II, p. 171.

[24] Mably, l'Abbé de, *Collection complete des oeuvres* (Paris, 1794–5); the work cited above forms Vol. VI of this collection.

demned in words which have since been frequently used against capture by public ships:

"Nous regarderions avec horreur une armée qui ferait la guerre aux citoyens et les dépouillerait de leurs biens; ce serait violer le droit des gens et toutes les lois de l'humanité. Or, je demande comment ce qui serait infâme sur terre peut devenir honnête ou du moins permis sur mer?"

The maintenance of capture as a right was contrary to the advantage of England, as it was to that of any commercial nation in proportion to the extent of its foreign trade. England's navy had not prevented, in the wars of the seventeenth and eighteenth centuries, the price of insurance from rising as much in England as in France; and English insurance companies had suffered from the activity of English captors, public and private.[25]

Galiani went further, demanding freedom of merchant vessels from attack by public armed vessels, always, of course, admitting the legality of seizing contraband.[26] Azuni, while upholding privateering as a political weapon, maintained that no merchant vessels should be seized unless carrying contraband.[27]

Rousseau incorporated the basic idea of Mably in words which became the common recourse of nearly all proponents of immunity:

"War, then, is not a relation between man and man, but a relation between State and State, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. In short, each state can have as enemies only other states and not individual men, inasmuch as it is impossible to fix any true relation between things of different kinds".[28]

Napoleon has left on record ideas strangely in contrast with the regulations of the decrees used against his island enemy:

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[25] Ed. of 1794–5, pp. 543–558.

[26] *De' Doveri de' Principe Neutrali Verso i Principi Guerregianti, e di Questi Verso i Neutrali* (1782), 1, c. 10, pp. 429–438.

[27] *Sistema universale dei principii del diritto marittimo dell Europa* (1796) Ed. of 1805, II, p. 238; see Boeck, p. 411.

[28] Rousseau, Jean J., *The Social Contract*, Tr. by H. J. Tozer (London, 1902), p. 106.

"Les mers n'appartiennent à aucune nation: elles sont le bien commun de tous les peuples et leur commun ressource. Les bâtiments de commerce ennemis appartenant à des particuliers devront être respectés".[29] And later: "Le commerce se ferait alors sur mer entre les nations belligérantes, comme il se fait sur terre au milieu des batailles que se livrent les armées".[30]

Boeck leads one to infer that Napoleon's sentiments may have solid basis in the quotation from Cauchy to the effect that the continental blockade, though affecting in a small way the commercial fortunes of England, did not interrupt the general mass of English commerce and that upon the establishment of peace, English commerce had exceeded all previous proportions.[31]

In the era of the Napoleonic hegemony two great jurists presided over the destinies of prizes in the English Court of Admiralty and in the French Conseil des Prises. Sir William Scott thus tersely expressed his attitude toward capture: "Enemies' cargoes are seizable at sea, whatever the ships, whatever the cargoes, and whatever the destination." Portalis, government commissary at the French prize court, while forced to regulate his advice in accordance with the public ordinances, held opinions conformable to the manifestoes of the Armed Neutralities. He expressed his own views at the installation of the Conseil des Prises (14 Floreal, An. VIII), so closely following Rousseau as to have been counted by many subsequent writers the originator of the doctrine that war should affect directly only the combatant population and the state which it represented in arms.[32] Portalis understood that war necessarily brought injury to the individual members of a state. But he argued that as those not actively participating had no direct share in carrying on operations, they were legally entitled to have their private property respected. His chief reliance was the evidence which the rule of respect for private property in land warfare afforded toward proving that that principle had become a rule of law, and he sought to prove that, since such a rule existed in land warfare, it must exist in all kinds and conditions of warfare between

[29] *Letter to Armstrong*, Aug. 22, 1809, quoted by Boeck, p. 89.
[30] *Memoires*, III, p. 301, see Boeck, p. 90.
[31] Boeck, p. 90.
[32] Boeck, pp. 413–414.

civilized states. This thesis runs as the central thread throughout the opinions of the partisans of immunity, appearing so continuously in writer after writer as to lead the student to accept it by reason of sheer force of the authority behind it.

The great majority of continental publicists, including the French, German, and Italian[33] schools have accepted the advisability of immunity and have bent their efforts toward convincing the English writers, who have as a rule had the support of American theorists. The weight of expert opinion has increased steadily throughout the past century and has had some effect upon the hitherto impenetrable defences maintained by English thinkers.[34] The bare mention of the eminent names which go to make up the list of those who desired and those who now desire greater freedom for commerce demonstrates the strength of the movement. Where noteworthy addition has been made to the argument it will be useful to observe its trend.

2. Italian Opinion

Romagnosi,[35] Lucchesi-Palli,[36] Mancini,[37] Vidari,[38] P. Fiore,[39] A. Pierantoni,[40] Casanova,[41] Brusa,[42] Pertile,[43] Paternostro,[44]

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[33] Pierantoni. A., "Les prises maritimes, d'après l'école italienne" in *R. D. I.*, VII (1875), pp. 619–656.

[34] The remarkable monograph of M. Charles de Boeck is indispensable to the study of 19th century writers up to 1882, and the writer has accepted his estimate of such works as have not been immediately available.

[35] *Questioni di diritto sulle prede marittime* (1834); see Boeck, p. 417.

[36] Transl., *Principes de droit public maritime* (1842); see Boeck, p. 418.

[37] *Prelezioni*, (1873), pp. 113–114, see Boeck, p. 423.

[38] *Del rispetto della proprietà privata fra gli stati in guerra* (1865); see Boeck, pp. 452–455. Also "Navires ennemis et marchandises ennemies" in *R. D. I.*, III, 1871, pp. 268–287.

[39] *Il diritto internazionale codificato* (Turin, 1909), pp. 601–611; *Trattato di diritto internazionale publico*, (Turin, 1891), III, pp. 195–218.

[40] "Les Prises, etc.", in *R. D. I.* (1875), VII, pp. 619–656.

[41] *Del diritto internazionale*, 3rd ed. (1876), II. pp. 152–156; see Boeck, p. 456.

[42] *Ibid.*, Annotated, I, CXVI, ff; II, pp. 163–174; see Boeck, p. 456.

[43] *Elementi di diritto internazionale moderne* (1877), I, pp. 294–299; see Boeck, p. 456.

[44] Transl., *Prises, reprises et judgments qui y sont relatifs.* Originally published at Naples (1879); see Boeck, pp. 457–458.

Amari,[45] and Silvetti,[46] all of whom demand respect for private property, may be cited as typical representatives of the Italian school. The argument of Vidari is most elaborate. The citizen, he says, delegates a part of his activity to the common fund of the state, retaining liberty of disposal over the remainder. He admits that war calls legitimately upon the citizen to sacrifice his own interests in so far as necessary for the good of the state, that necessity being measured by the portion of his activity which he has delegated to the state. War, being a relation of state to state, should be carried on by means of the public forces of each state. The private citizen should experience the direct effects of war only in so far as he participates in the military operations. Any damage to property suffered by him should be indirect. Justice demands that the same principle be applied on sea as on land. Differences in conditions may call for differences in the application of the principle but they do not alter the principle itself. Ships on the high seas are under the sovereignty of the state whose flag they fly. Thus the legal relationships which are produced upon these ships are of the same sort as the legal relationships which are produced on land.

Fiore declared that the abolition of capture would not prolong wars; that there was no justice in attempting to enforce one law on land, another at sea; that capture could not be justified on the theory of contributions. While maintaining the principle of immunity, Fiore urged it particularly on practical grounds.

Tullio Giordana in his recent monograph, also dealing with the question mainly from the standpoint of policy, arrives at the opposite conclusion. To him: "E assolutamente impossible separare l'individuo dallo stato"; private property is not respected in warfare on land; the legal foundation of capture is the right which a belligerent has of temporarily occupying the sea by excluding his enemy under penalty of the confiscation of his ships and cargoes; the moral effect of capture is important: "Ma anche ridotto a fornir episodi di secondaria im-

[45] *Del rispetto della proprietà privata nelle guerre marittime archivio giuridico* (1898), I; see H. Bonfils, *Manuel de droit international public*, 4th ed., edited by P. Fauchille (Paris, 1905), pp. 710–711.

[46] *La proprietà privata nemica sul mare dev essere inviolable* (1901); see Bonfils, pp. 710–711.

portanza alla storia di guerra, il mezzo che noi sosteniamo contribuirebbe sempre a preparare quello stato psicologico che induce un popolo alla pace''. Giordana finally expresses his opinion as favorable to the political convenience of capture to Great Britain, Germany, France, the United States, and Italy.[47]

3. German Opinion

The German school in the nineteenth and in the present century has not so unanimously maintained the demand for the inviolability of private property in warfare at sea. Publicists of such weight as Schwebemeyer,[48] Röpcke,[49] von Maltzahn,[50] Ph. Zorn,[51] W. Hamman,[52] T. Niemeyer,[53] and Oppenheim,[54] oppose the abolition of the rule of capture. Perels is counted by Oppenheim as amongst the opponents, although Bonfils has placed his name in his list of partisans.[55] And Hans E. Posse con-

[47] *La proprietà privata nelle guerre maritime* (Turin, 1907) pp. 60, 67, 80, 88, 90–92.

[48] *Das Privateigentum zur See im Kriege* (Berlin, 1860); see Posse, H. E., *Das Seebeuterecht, Zeitschrift für Internationales Recht,* 21, 1911, p. 175.

[49] *Das Seebeuterecht* (Leipzig, 1904), pp. 36–47; see Posse, p. 174.

[50] "Der Seekrieg," in *Deutsche Rundschau,* 121, 1904, p. 105.

[51] "England und die neuere Entwicklung des Völkerrechts," in *Deutsche Juristen-Zeitung,* Oct., 1906, p. 1051; see Posse, p. 175.

[52] *Der Streit um das Seebeuterecht* (Berlin, 1907) pp. 31–32.

[53] *Prinzipien des Seekriegsrechtes* (Berlin, 1909); see Posse, p. 174.

[54] *International Law,* II, p. 223.

[55] *Das internationale öffentliche Seerecht der Gegenwart* (Berlin, 1908), pp. 194–198. Oppenheim considers Perels one of an increasing number of continental publicists "who oppose the abolition of the once so much objected to practice of capturing enemy merchantmen", II, p. 223, n. 1. Posse agrees with Bonfils in regarding Perels as a partisan of abolition. Perels' discussion of the movement for the abolition of booty-right at sea is largely taken up with the history of the question. It appears, however, that he is opposed to capture but sees no early prospects of its abolition. On page 194 Perels says: "Seebeuterecht und Kaperei decken sich im allgemeinen in ihren Wirkungen. Gegenstand beider ist das feindliche Privateigentum auf dem Meere; beider Ziel dessen Wegnahme und überhaupt der Ruin des feindlichen Seehandels, wobei jedoch häufig, bei der Kaperei stets die Erzielung eines Gewinnes auf seiten der Kaptoren (Nehmeschiffe) in dem Masse in den Vordergrund tritt, dass beides, Ausübung der Kaperei und Ausübung des Seebeuterechts durch Kriegsschiffe, vielfach als ein System privilegierten Raubes bezeichnet worden ist". His views as to the prospect of abolition are to be found on pages 196 and 198: "Nach Lage der Verhältnisse ist auf eine Beseitigung des Seebeuterechts in absehbarer Zeit nicht zu rechnen"; and: "Es ist daher nicht erfindlich, wie Leroy im Hinblick auf dieses Ergebnis die Prognose stellen kann: 'Il n'est donc pas douteux dans un jour très prochain la prise de la propriété privée ennemie sur mer sera rayée du Code des nations' ".

cludes his detailed study, *Das Seebeuterecht,* with this discouraging sentence: "Dies Ergebnis erhärtet die Anschauung, dass di beste Kriegsversicherung für jeden Staat die eigene Stärke bildet."[56]

On the other hand, the majority of German publicists have supported inviolability. Heffter wished to substitute sequestration for capture, since it appeared to him chimerical to demand the more extensive reform.[57] Zachariae,[58] Berner,[59] Kaltenborn,[60] Dr. Aegidi,[61] Holtzendorff,[62] Gessner,[63] Bluntschli,[64] Bulmerincq,[65] Tecklenburg,[66] Geffcken,[67] and Wehberg[68] have expressed themselves without ambiguity as partisans of inviolability. Attlmayr of Austria declared that the Declaration of Paris had left weak states in a still more dangerous position than they had formerly occupied and that it was to the interest of his country that immunity should become a legal principle.[69] Zachariae's central thesis was that of Rousseau: According to public law war is simply a relation between governments; "Die unterthanen des feindlichen Staates sind nicht deswegen, weil sie *de jure* als Feinde betrachtet werden können, sondern nur,

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[56] Posse, p. 377.

[57] *Das europäische Volkkerrecht,* 8th ed., edited by H. Geffcken (Berlin 1888), pp. 297–307.

[58] *Vierzig Bücher vom Staate,* IV, Abth. 1, 2; see Boeck, p. 419.

[59] Beute, in *Deutsches Staats-Wörterbuch* (Bluntschli, 1857), II, pp. 115–118; cited by Boeck, p. 431.

[60] Article in same publication (1865), pp. 375–385; cited by Boeck, p. 432.

[61] *Frei Schiff unter Feindes Flagge* (Hamburg, 1866); cited by Boeck, p. 469.

[62] *Encyclopedie der Rechtswissenschaft* (2nd ed., 1876), *Prisengerichte,* p. 367; see Boeck, p. 470.

[63] *Das recht des neutralen Seehandels* (Bremen, 1855); see Posse, p. 125. "De la reforme du droit maritime de la guerre" in *R D. I.,* (1875), pp. 236–255.

Le droit des neutres sur mer, (2nd ed., Berlin, 1876), pp. 1–82; 246–294; *Kriegführende und neutrale Mächte,* (1877); see Boeck, pp. 473–474.

[64] *Das Beuterecht im Kriege und das Seebeuterecht inbesondere* (Nordlingen, 1878); Translated into French and published in *R. D. I.* IX, (1877), pp. 508–557 and X, (1878), pp. 60–82.

[65] *Das Völkerrecht* (1887); see Bonfils, p. 718.

[66] *Die Freiheit des Meeres* (Bremen, 1870); cited by Posse, p. 173.

[67] Annotation of Heffter, *cit. infra;* also in Holtzendorff, *Handbuch des Völkerrechts* (Hamburg, 1889) IV, pp. 597–601.

[68] *Capture in War on Land and Sea,* (London, 1911).

[69] *Die Elemente des Internationalen Seerechts* (1872), I, pp. 52–65; see Boeck, pp. 467–468.

wenn und in wie fern sie *de facto* Feinde sind, feindselig zu behandeln." L. Neumann, the Austrian publicist, condemns the law of maritime capture as barbarous and contradictory of itself: "il ne frappe que la chose ou la marchandise sur flot, non celle qui est déjà déchargée ou qui n'est pas encore chargée."[70]

Gessner was willing to admit the absolute necessity of the capture of the crews of merchant vessels but considered that sequestration should replace confiscation of private enemy ships and cargoes. If private property were made immune from capture, it would be necessary to admit preëmption. Necessities would always have to be observed in warfare but real and imaginary necessities were always to be distinguished. Gessner was optimistic as to the prospect for the principle of inviolability. He was especially a critic of Great Britain upon whom he placed the responsibility for a state of law by which "les guerres maritimes de celle époque [since 1750] conservèrent, en règle générale, même vis-a-vis des neutres, le caractère spoliateur du moyen-âge." He declared that British parliamentary debates had maintained the repetition of eighteenth century principles, but that, England's maritime predominance being now much less certain or entirely lost, she should reconsider her formerly justifiable position as defender of the rules of capture.[71]

Bluntschli has expressed the theoretical concept of the relationship between war and individual in the manner of Vidari:

"Chaque individu se trouve dans une double position; d'un côté, il vit pour lui seul, il est une personne privée; comme tel, il a un grand nombre de droits quant à sa personne, quant à sa famille, à sa fortune; il a des droits privés. Comme la guerre ne se fait pas entre les simples citoyens, elle n'a point pour conséquence l'extinction des droits privés, et ces derniers ne peuvent jamais dépendre du bon plaisir de l'ennemi.

"De l'autre côté, chaque individu est citoyen d'un état; en cette qualité, il est interessé à la lutte que soutient son pays. Le sort de sa patrie ne saurait lui être indifférent. Il prend sa part des succès ou des revers de l'état auquel il appartient. Son devoir comme citoyen

[70] *Droit des gens modern.* Translated from the third German edition (Paris, 1886), pp. 194–195.

[71] "De la reforme du droit maritime de la guerre" in *R. D. I.*, VII, (1875), p. 256, ff.

est de donner ses biens et sa vie pour la patrie en danger. Sur le terrain du droit public, tous les citoyens sont tenus à de nombreuses prestations envers l'état".

From these considerations Bluntschli declares that modern international law makes this distinction:

"En tant que simples particuliers, les individus ne sont pas ennemis. En tant que citoyens d'un état donné, ils participent à l'inimitié des états auxquels ils appartiennent. Pour tout ce qui concerne les droits privés, c'est le pied de paix et les droits admis en temps de paix qui font règle. Dès que le droit public est en cause, le pied de guerre commence, et les lois de la querre entrent en vigueur."[72]

Bluntschli admits that those persons "qui prennent à la conduite de la guerre une part active, en soutenant les troupes les armes à la main ou en rendant des services personnels à l'une des parties belligérantes, sont placées par contre dans une tout autre position", that is than that of "simples particuliers".

He rejected the defence of certain writers to the effect that the capture of private property at sea could not be assimilated to seizure of such property in continental warfare because in the latter it was possible to take possession of a portion of territory and to obtain thereby "un moyen puissant de contraindre l'état avec lequel elles sont en guerre à reconnaître leurs pretentions", whereas "les puissances maritimes . . . n'avaient pas ce moyen, parceque leur force se restreint à la mer et aux côtés". He denied that this handicap should be regarded as justifying "les puissances maritimes de se pourvoir d'un autre moyen de contrainte" when that "other means" was that "d'anéantir le commerce maritime et de s'emparer des navires ou marchandises de l'ennemi". The use of such a means of warfare was not justified because: "l'insuffisance des moyens légitimes de faire la guerre, ne peut jamais justifier l'emploi des moyens illégitimes . . . . On reconnaîtra que c'est une tache pour notre civilisation, que d'admettre le droit de saisir les biens des particuliers, sous prétexte qu'on est en guerre maritime avec l'état dont ceux ci sont ressortissants".[73]

[72] *Le droit international codifié*, 2nd ed. (Paris, 1874), p. 33.
[73] Bluntschli, p. 42.

Bluntschli found hope of reform in the change of attitude on the part of civilized nations toward private enemy persons: "Les nations civilisées ont aujourd'hui conscience que l'humanité constitue une communauté, non-seulement naturelle et morale, mais juridique, à laquelle aucun peuple, aucun Etat ne peut se soustraire".[74]

Geffcken viewed the problem in the light of recent history. The Franco-Prussian war had demonstrated that the importance of the right to confiscate private property at sea had been exaggerated. When war broke out those interested had notified vessels by cable to remain in neutral ports with the result that the French fleet made but few captures. He believed that the merchant marine of an enemy would furnish many more sailors to his navy if forced to lie idle than if permitted to continue its natural activity. To suppress the capture of merchant ships would be to shorten wars, because the navy would be able to center all its efforts upon the annihilation of the enemy navy.[75]

Wehberg accepts the doctrine that war is a relationship which can exist only between states. But he does not deduce the same consequences of that doctrine as did certain of the earlier writers.

"Since reasons of war must form the guiding principles at sea as well as on land, it may very easily be that sea warfare requires quite different measures. Although the permanent retention of private property at sea can in no way be justified, a reference to the regulations for land warfare by no means refutes the right of temporary seizure at sea . . . Rather the question arises whether military necessity at sea does not demand at least a temporary embargo on the enemy's private property. It will, however, be shown later that prize at sea can by no means be justified by necessities of war, and thus all defence of that right is proved to be unfounded".[76]

Wehberg attacks the position of Hamman in which the latter gave his opinion as being: (1) that on land the enemy state can,

[74] *R. D. I.*, (1877), p. 509.

[75] Geffcken declared the Declaration of Paris unjust as throwing the trade of the belligerents into the hands of the nations that are not endangered; see von Holtzendorff, F., *Handbuch*, IV, p. 597 ff. On p. 601 he says: "Der nächste grosse Krieg wird England unfehlbar die bittere Erfahrung bringen, dass es durch seinen widerstand gegen diese Reform gegen sein eigenstes Interesse gehandelt hat."

[76] Wehberg, p. 20.

"by virtue of the power acquired, prevent hostile use of private property as a matter of course", and (2) "that in land warfare private property is bound to the soil, and cannot be rescued from the invading foe, while in naval warfare . . . merchandise may be exposed to the risks of war without natural hindrance". In reply to the first proposition Wehberg points out that "there is no reason why several patriotic millionaires should not lend their whole fortune to the state" and that "the ready money of individuals on land [is] much more useful than goods afloat at sea which must first be turned into money". To the second argument he replies that war in accordance with it would mean "that the peaceful inhabitant [would] also have to lose his property in land warfare, if, on the outbreak of war he did not quickly put his fortune out of reach, but kept it by him" and that private property on land is not bound to the soil because any citizen on the outbreak of war could secure his money in the banks of a neutral state.[77]

Wehberg believes that reform will come only when the nations regard themselves as "equally privileged" by it. "Whereas on land this [equality of privilege] was arrived at only at a very late period, primarily by means of the Peace of Westphalia, in naval warfare a generally acknowledged international code could only be evolved much later, because, throughout, some one State held the predominance at sea".[78] Spain, the Netherlands, and, today, England, have successively refused to consent to reform.

Speaking of the effect of the second rule of the Declaration of Paris, Wehberg declares that: "If the law of prize was intended to destroy the enemy's commerce, then the adoption of the maxim, "Free ship, free cargo" was a violation of that principle, or [an] international declaration that this should be the first step towards the abrogation of that ancient right."[79] It operated, leaving blockade out of consideration, to insure the maintenance of the imports and exports of belligerents by means of neutral vessels. Wehberg considers that "no serious doubt

[77] *Ibid.*, pp. 22–23.
[78] *Ibid.*, p. 23.
[79] *Ibid.*, pp. 129–130.

can be entertained as to the ability of neutrals to take over the commerce of belligerents".[80]

He points out the impossibility of an effective blockade of all the French or British ports and the consequent unlikelihood of blockade operations rendering ineffective the freedom granted to enemy property under the neutral flag, recognizing, however, that: "Possibly a blockade of the German coasts by England, or several other great maritime powers is conceivable".[81] The development of communications has rendered non-existent the possibility of even an effective blockade starving out the country blockaded. His comment after analyzing the nature of the exports and imports of the principal countries is: "Thus we see that not only the law of prize but of blockade as well is based on obsolete conceptions . . .".[82] Wehberg discusses the effectiveness of capture in past wars and closes his chapter on the abolition of the law with this commentary:

"One must not therefore [i. e., from the fact that capture has never had a decisive influence] deny to the right of prize all effect in a war at sea. In many cases it will, doubtless, evoke minor subsidiary results. But is such effect so valuable as to justify the grave injury to the world's economy which must necessarily follow in the wake of that right? The question can only be answered in the negative if one sums up the actual effects of the right".[83]

Oppenheim who should, perhaps, be classed with English publicists, does not discuss the question of principle further than to say that "it is a matter for politicians, not for jurists, to decide whether Great Britain must in the interest of self-preservation oppose the abolition of the rule that sea-borne private enemy property may be confiscated."[84] From the viewpoint of policy "there is no doubt that the abolition of this rule would involve a certain amount of danger to a country like Great Britain whose position and power depend chiefly upon her navy." He stresses on the one hand the importance of being able to annihilate an enemy's commerce, on the other to forestall, through

[80] *Ibid.*, p. 130.
[81] *Ibid.*, p. 133.
[82] *Ibid.*, p. 135.
[83] *Ibid.*, p. 135.
[84] *International Law*, II, p. 223.

capture, the transformation of large merchant liners, especially constructed for the purpose, into auxiliary cruisers.[85] The most striking statement made by Professor Oppenheim is that: "Today it may perhaps be said that even if Great Britain were to propose the abolition of the rule, it is probable that a greater number of the maritime States would refuse to accede." And he notes a "slow, but constant, increase in the number of continental publicists who oppose the abolition of the once so much objected to practice of capturing enemy merchantmen."[86]

4. French Opinion

A majority of French publicists are partisans of the principle of inviolability, but Ortolan, the greatest opponent of that principle is one of the French minority, and he does not lack for support within his own country. The important works in which opposition to the principle finds expression are those of Ortolan,[87] Pistoye et Duverdy,[88] Hautefeuille,[89] Barboux,[90] Emile Carron,[91] Admiral Aube,[92] Funck-Brentano et Sorel,[93] Delalande,[94] Raynaud,[95] Boidin,[96] and Dupuis.[97] This considerable list of eminent authors provides some insight into the continental opposition to the abolition of prize.

Ortolan agreed with his opponents that war should be re-

[85] *Ibid.* pp. 222–223.

[86] *Ibid.*, pp. 223–224.

[87] *Règles internationales et diplomatie de la mer,* 3rd ed., (Paris, 1856), II, pp. 35–60.

[88] *Traité des prises maritimes* (Paris, 1859), I, pp. 3–18.

[89] *Des droits et devoirs des nations neutres,* 3rd ed., (Paris, 1868), III, pp. 203–204; *Questions de droit maritime international* (Paris, 1868), pp. 61–109; *Histoire du droit maritime international* (Paris, 1869), *passim.*

[90] *Jurisprudence du conseil des prises pendant la guerre de 1870–1871* (Paris, 1871), pp. 17–35.

[91] *La course maritime* (1875), pp. 16–30; cited by Boeck, pp. 532–533.

[92] *Un nouveau droit maritime international* (1875), pp. 15–19.

[93] *Precis du droit des gens* (3rd ed. Paris, 1900), pp. 402–404.

[94] *Des prises maritimes* (1875) pp. 57–106; quoted by Boeck, pp. 533–534.

[95] *Du principe du droit de prise dans la guerre maritime* (1900); cited by Bonfils, p. 710.

[96] *Les lois de la guerre et les deux conférences de La Haye* (Paris, 1908), pp. 144–162.

[97] *Le droit de la guerre maritime d'après les doctrines anglaises* (Paris, 1899), pp. 35–47; *Le droit de la guerre maritime d'après les conferences,* (Paris, 1911), pp. 55–86.

garded as a relation between states and that private property should be interfered with as little as possible. But he recognized that an enemy does not possess at sea the same means of injuring his opponent that he can exercise on land. And he based his objection to abolition mainly upon two grounds, both political: (1) That the mercantile navy is a means of naval power always ready to come to the aid of a belligerent, and (2) that if a weaker power can continue its trade unmolested, the superior naval power of its enemy would prove of no advantage.

Pistoye et Duverdy considered war to concern the belligerents only as states, but they defended prize as a necessary means for the weakening of the enemy and the shortening of war. Here it may be interpolated that by the phrase "relation between states" is meant that only in their "public capacity," i. e., as soldiers, marines, aviators, etc., enlisted in the public armed forces of the state, may individuals take part in military operations and so become liable to have exercised against them the consequences of their public status. But if, by engaging in a trade absolutely necessary to the home state a private individual thus becomes an indirect participant in war, does he not render himself liable, if not to the extreme rigors of war, at least to the loss of his investment and profits? Soldiers are not killed for the sake of killing; so private property is not captured and destroyed except with the object of striking at the resources of the enemy state. Both the soldier and the maritime entrepreneur are, perhaps in different degrees, public agents.

Hautefeuille was, at the same time, an ardent defender of capture and of the rights of neutrals. He believed that inviolability in law would be futile unless contraband, visit and search, and blockade also were abolished.[98] He declared that there existed no law of land warfare rendering property inviolable; that "the interest of the conqueror [was] always the basis and measure of his moderation."[99] But his argument tends to show that so different are the persons and property engaged in commerce at sea from those in land trade that, even if he ad-

[98] *Des droits et devoirs des nations neutres*, III, pp. 203–204.
[99] *Questions de droit maritime international*, pp. 74–84.

mitted that private property was respected on land, he would still be able to draw conclusions fatal to respect for such property at sea.

Hautefeuille's idea of American policy is interesting if somewhat uncomplimentary: "Dans ce pays, les idées humanitaires sont, tout le monde le sait, subordonnées aux intérêts matériels." In proposing inviolability in 1856 Marcy wished: (1) to support the Monroe Doctrine, (2) to relieve the small American navy from the task of protecting a merchant marine which "dépasse, pour le nombre et le tonnage des navires, la marine britannique elle-même."[100]

This learned writer said that immunity for enemy property would injure rather than assist neutrals because it would decrease their carrying trade in time of war.[101] He appears to have regarded the losses sustained by neutrals who send their goods by enemy vessels as comparatively unimportant and to have underestimated the importance of the facts that in time of war belligerents do not trade with one another and that neutrals would still have the immense carrying trade left free by virtue of belligerent necessity for vessels to transport troops and supplies.

Barboux illustrated the evils of warfare on land by means of the war of 1870–1871. Whereas the French captures at sea were valued at but six million francs, "les ruines subies sur terre par des propriétés privées inviolables dépassent le somme de six cents millions."

Admiral Aube was unable to admit the utility of principles of justice as applied to war: "il dépend de considerations de tout autre ordre, de convenances dont ceux qui sont chargés du succès de la guerre, qui en sont responsables, jugent seuls et en dernier ressort."

Boidin denies emphatically the truth of the maxim that "la guerre est une relation d'Etat à Etat." "Les individus ne peuvent pas être laissés en dehors des hostilités, ils ne peuvent pas être séparés de l'Etat auxquels ils appartiennent . . . . Il est vrai de dire seulement que les non combattants et la pro-

[100] *Questions*, pp. 97–106.
[101] *Ibid.*, pp. 102–104.

priété privée seront respectés dans la mesure où la guerre le permet." No one, he urges in reply to Boeck, holds that, without the right of capture, maritime war would be impossible, but that it would be powerless. He refuses to agree with Boeck that the possible utilization of merchant vessels for war purposes is the principle *raison d'être* of the right of capture: "Ce qui forcera l'ennemi à se soumettre, dans la guerre maritime, ce sera la ruine de son commerce et la panique financière qui s'en suivra. Le droit de prise est nécessaire pour obtenir ce resultat."

Dupuis has made himself a rival of Ortolan in his complete and clear exposition of the realities of the situation. The question of principle does not appear to him important, though he compares the opinions of the continental and the English schools in that regard.

"Il importe d'autant plus d'examiner qui a tort ou raison dans ce débat que de l'utilité ou de l'inutilité de la confiscation dépend, en definitive, sa légitimité ou sa condamnation. War, necessarily brutal, authorizes all violence tending to bring about the submission of the enemy and the reëstablishment of a durable peace. If capture has this virtue, it is the more justifiable since, among means of violence, it is certainly not the most barbarous".[102]

Dupuis believes that the real object of maritime warfare is to deprive the adversary of his use of the sea. The sanction of this prohibition is capture, which disorganizes the economic life of the enemy just as warfare on land disorganizes that life. Against purely continental powers the prohibition is useless, against powers partly maritime it is advantageous, while against purely maritime powers such as England "l'interdiction de l'usage de la mer est la menace la plus dangereuse." He quotes Wilson upon this point: "The air that they breathe is not more necessary to human beings than is the free and uninterrupted passage of her ships upon the seas to England."[103]

Examining the question from the viewpoint of the conflict between belligerent and neutral interests Dupuis considers that, since neutrals are rendered by war able, though involuntarily,

[102] *Le droit de la guerre maritime d'après les doctrines anglaises*, p. 41.

[103] *Ibid.*, p. 46. Quoted from Wilson, H. W., "The Protection of our Commerce in War" in *XIXth Century*, 39, February, 1896, p. 219.

to injure a belligerent's cause, they should be willing to endure in patience restrictions upon themselves. They should not expect to see their commerce extend itself at the expense of belligerents, though they rightly could hope that it should not be diminished by a war in which they took no part.[104]

Capture at sea was not to be assimilated to pillage on land since "en tous cas, l'occupation du territoire suffit à exercer la contrainte qui détermine à céder" whereas at sea, on the one hand, "the confiscation of ships and cargoes of the enemy may, undoubtedly, cause the ruin of some individuals, but elle ne consomme pas, avec la brutalité d'une dévastation systematique, la ruine totale de populations surprises par l'invasion," while on the other hand, "sur mer, où il ne peut être question d'occupation, il n'est que plus nécessaire de sanctionner rigoreusement les infractions a l'interdiction de transport qui peut seule amener le reddition du vaincu."[105]

If France has produced the most eminent partisans of prize, considered as a means of warfare in general rather than as the weapon of a particular state, she has also most completely developed the theories upon which inviolability is based. Mably, whose work has already been touched upon,[106] Massé,[107] Leveillé,[108] Pradier-Fodéré,[109] Cauchy,[110] Gueronnière,[111] Desjardins,[112] Boeck,[113] Piédelièvre,[114] Rivier,[115] Leroy,[116] Nys,[117]

[104] *Ibid.*, pp. 48–50.

[105] *Le droit de la guerre maritime*, pp. 4, 6.

[106] *Droit public de l'Europe*, pp. 543–558.

[107] *Droit commercial dans ses rapports avec le droit des gens et le droit civil*, (1874), I, pp. 109–111; 143–144; cited by Boeck, 419–422.

[108] *De l'inviolabilité de la propriété privée des belligérants sur mer*, (1863), p. 7; cited by Boeck, pp. 440–442.

[109] *Vattel's droit des gens* (Paris, 1863), III, p. 107, n. 1; *Droit international public* (Paris, 1885–1906) VIII, pp. 43-135.

[110] *Du respect de la propriété privée dans la guerre maritime* (1866); see Boeck, pp. 445–449.

[111] *Le droit public et l'Europe moderne* (Paris, 1876), II, pp. 290–305; cited by Boeck, pp. 449–450.

[112] *Traité de droit commercial maritime* (Paris, 1878), pp. 35–45; cited by Boeck, pp. 450–452.

[113] *De la propriété privée ennemie sous pavillon ennemi* (Paris, 1882), pp. 395–585.

[114] *Précis de droit international public du droit des gens* (Paris, 1894–1895), II. pp. 431–439.

[115] *Principes du droit des gens* (Paris, 1896), II. pp. 331–332.

[116] *La guerre maritime* (Brussels and Paris), 1900, p. 144.

[117] *Le droit international* (Paris and Brussels, 1904), III, pp. 454–468.

Bonfils,[118] Bon,[119] Despagnet,[120] and Peillon[121] have sustained the thesis of immunity with varying degrees of enthusiasm for the principle of the reform.

Cauchy took account of the fact that as civilization has progressed, war has continuously become in larger part a relation between states. But he did not emphasize the legal nature of that relationship, as a principle incumbent upon belligerents to observe. Instead he viewed the respect for private property in war as an evidence of the advance of Christian civilization, as a moderation of the rigorous rights of belligerents by the softening of custom and by the happy development of a generous policy, which proposes to lessen, so far as possible, the evils of war. Cauchy's view of the question is lacking neither in observation of the realities nor in hope for the future.

Boeck, however, maintains that Rousseau's conception of war is the true one, and that it does not entail the consequence that individuals must be regarded simply as onlookers: "Elle signifie simplement que les Etats belligérants ne pourront s'attaquer aux particuliers directement ou principalement, que les droits privés ne sont pas éteints par la guerre et ne dépendent pas du bon plaisir de l'ennemi".[122] He regards capture as the "direct negation" of the principle that war is a relation of states only and insists that this principle is actually observed in continental warfare.

"Il est non moins certains que des abus ont été frequement commis: le principe de l'inviolabilité se heurte dans la guerre continentale à de grandes difficultés d'application. Mais depuis quand les violations de la règle renversent elles la règle ell-même? Parce qu'un principe de droit est violé, ce principe n'existe plus! Plus les abus sont criants, plus le principe s'affirme et doit être maintenu vigoureusement par le jurisconsulte. Là n'est pas la difficulté: la véritable question est de

[118] *Manuel de droit international public,* 4th ed, edited by Fauchille (Paris, 1905), p. 730.

[119] *La guerre russo-japonaise et la neutralité* (Montpellier, 1909), p. 23.

[120] *Cours de droit international public,* 4th ed., edited by C. de Boeck, (Paris, 1910), pp. 1071–1075.

[121] *La propriété privée ennemie* (Paris, 1910).

[122] Boeck, p. 552.

[123] *Ibid.,* pp. 553–554. And on p. 555: "On peut donc dire en définitive, que, malgré les requisitions et les contributions, en dépit de bien des misères et des abuses, la propriété privée est respectée sur terre".

savoir si, dans la guerre continentale, les particuliers inoffensifs sont, en règle, respectés dans leur personne et surtout dans leurs biens".[123]

Capture cannot be likened to contributions in continental warfare, Boeck says, because capture "knows no other bounds than the power of the belligerent while requisitions are restricted to the needs of the occupant". He attacks capture also as inefficacious, replying to the argument that represents it as the sole means of attack against Great Britain with the declaration that in view of modern inventions, maritime warfare will increase rather than decrease in effectiveness. As it is, he says: "Le commerce ennemi échappera aux atteintes des vaisseaux de guerre grâce au pavillon neutre . . . . Le moyen d'action ainsi limité n'aura pas, aujourd'hui moins que jamais, cette énergie terrible et decisive que se plaisent à lui attribuer ses partisans."[124] And even though the economic interests of an opponent nation are made to suffer there is certain to be a reflex injury to those of the other belligerent.

He admits the importance of the argument that merchant ships can readily be transformed into warships or used as transports. But he urges that: "Le fait qu'une catégorie quelconque d'objets pourrait un jour être utilisée pour la guerre ne suffit pas pour la rendre dès à présent sujette à saisie ou à capture . . . le droit ne peut prendre en considération qu'une nécessité militaire actuelle et constatée". Boeck would permit the capture of such vessels, but not until they were actually in military use or about to be so used immediately. He would have advocated sequestration, with restitution or indemnity at the end of the war, for other sorts of merchant vessels, but for the fact that the expenses of upkeep during war would amount to the vessel's value, and that this would result in great difficulties between the captor state and enemy individuals. Instead, therefore, of sequestration for such ships, Boeck advocates that the right of requisition be established as regards vessels susceptible of employment in warlike operations, and that others, not susceptible of such use, be allowed to go entirely free from any liability. Likewise he would establish a right to preëmpt enemy cargoes under enemy flags provided they could

[124] *Ibid.*, p. 557.

be of use in military operations, mentioning such articles as oil, food, and naval stores.[125]

Boeck believed it to be to the interest of neutrals that capture be abolished, because they suffered in common with the belligerent nations from the disturbance of commerce by war. "Mais il ne faudrait pas aller jusqu'à dire, comme on la fait parfois, que les neutres ont droit à ce que le principe du respect de la propriété privée soit reconnu et appliqué par les belligerants."[126]

Considering, finally, the policy most expedient for adoption by Great Britain, France and other states, Boeck comes to the conclusion that for them all the balance of advantage lies with immunity. This is true for England because (1) it would enable her to concentrate her fleet, (2) her existence is absolutely dependent upon her maritime commerce, (3) she cannot hope to secure her immense commerce by placing it under the neutral flag, (4) her possible continental opponents can carry on their commerce through neutral ports, since communications have been so completely developed; it is less certainly true for France because already two-thirds of her commerce is transported in foreign vessels—Boeck does not mention how large a proportion of this amount is carried by English vessels—and the remainder could readily be transferred in time of war. And France can have recourse to the import of necessities by land if necessary. Nevertheless Boeck inclines to agree with Mably that it is to the interest of France to spare herself the injuries which capture involves, since the war of 1870–1871 had demonstrated that "C'est sur terre que se viderait le débat et que se déciderait le sort de la France."[127] Even though it be granted that capture would be of greater advantage in itself in a war with England,

"croire que la capture est entre les mains de la France une arme aussi redoubtable contre l'Angleterre, c'est se faire une étrange et dangereuse illusion, que contredisent l'histoire de la guerre de Cent-Ans, celle de la guerre de la succession d'Espagne, qu'on évoque sans cesse, celle de la guerre de Sept-Ans, enfin l'histoire des guerres de la Révolution et de l'empire".[128]

[125] *Ibid.*, p. 565.
[126] *Ibid.*, p. 566.
[127] *Ibid.*, p. 580.
[128] *Ibid.*, p., 581.

Subsequent French writers have not advanced the theory beyond the position reached by Boeck. It is of interest to note that Nys, while arguing for immunity principally on practical grounds and on the basis of neutral rights, is in accord with his school in holding that: "Relation d'Etat à Etat et non relation d'homme à homme, la guerre ne peut frapper les biens des particuliers; la règle est vraie dans la guerre sur mer comme dans la guerre sur terre." Pradier-Fodéré has made an extended examination of the history of the question and of its present importance in practice and theory. While asserting strongly the necessity for viewing it as in the main a legal and humanitarian issue, he is willing to regard the necessities of war, and to exclude from protection enemy merchant vessels which "accept directly or indirectly functions which permit their being regarded as instruments of war"; he would also admit with Boeck the propriety of the requisition of merchant vessels of the enemy and of the preëmption of enemy food, oil, clothing, and other like articles on board such vessels, in cases of necessity, while refusing approval to sequestration. This learned writer sums up the prospects for immunity in the following paragraph:

"These three sorts of manifestations—of publicists, of commercial interests, of public agencies—show the progress that has been made and that something other than a chimera is being pursued. The abolition of this iniquitous means of warfare will take place when all states shall have come to realize that, independently of moral considerations, which are nevertheless so fundamental, they are all interested, belligerents or not, in preventing the exchange of the products of their industry and agriculture from being annoyed or interrupted; that by virtue of the solidarity which exists between peoples, one nation cannot be impoverished without prejudice or suffering to others, that to ruin the commerce of his enemy is to prepare the ruin of his own; that private property, finally, should be, in war as in peace, on sea as on land, respected by governments as well as by individuals, because it is at the basis of all society".

Peillon denies the thesis that capture is the sanction of the prohibition by one belligerent of the other belligerent's right to use the seas. "One no longer speaks of interdicting the sea to his enemies." He regards Lorimer's "very curious legal theory" according to which a state should indemnify its citizens for losses sustained through capture as "ingenious but Utopian." "The state," he says, "will refuse to accept the receipt

delivered by the adversary because to accept it would be to invite the remorseless capture of the property of its subjects." He brings out, also, the idea that war at sea is regarded, in spite of the theoretical freedom of private property on land, as more merciful than continental warfare simply on the assumption of non-resistance which he regards as an unnatural assumption. And he denies that mercantile losses through capture are less hard on individuals than losses through requisitions and contributions in land war.

"Every merchant has general expenses, the interest on capital engaged is lost and ruin sometimes follows. The landed proprietor suffers no more than the ravaging of his crops. Merchants can insure themselves, indeed, but if the payment of insurance premiums shall absorb the profits, ventures are useless."

Raynaud goes too far, Peillon holds, in saying that if merchants suffer, so much the worse for them, that they have taken the risk and should expect to stand the loss. "A merchant gains not for himself alone, loses not for himself alone." Injuries to maritime commerce are felt throughout an entire country.

With Boeck, Nys, and Pradier-Fodéré, Peillon agrees as to the propriety of instituting the rights of requisition and preëmption at sea. He would go farther than the last named and permit sequestration. He believes with Dupuis that other powers than Great Britain would render impossible the abolition of prize today. But he refuses to admit that France would actually lose by the abândonment of prize. "A nous il semble qu 'il y aurait progrès a protéger les droits des particuliers. Jamais la guerre ne sera trop douce."

5. Opinion in Other European Countries

It is proper to mention certain other continental writers whose attitudes upon the present question are important. Among these the principal publications opposing the reform are those of Tetens,[129] Negrin,[130] Riquelme,[131] and Olivart.[132] The

[129] *Considèrations sur les droits réciproques des puissances belligérantes et des puissances neutres* (French Edition, Copenhagen, 1805), pp. 10–17 (Danish); cited by Boeck, pp. 415–417.

[130] *Tratado elemental de derecho internacional maritimo* (1873), pp. 146–164; see Boeck, pp. 549–551.

[131] *Elementos de derecho público internacional* (Mataro, 1875), pp. 258–303.

[132] *Tratado de derecho internacional público,* 4th ed., (Madrid, 1903), pp. 205–225.

partisans of inviolability are more numerous. Pinheiro Ferreira,[133] Rochussen,[134] Rolins-Jaequemyns,[135] Saripolos,[136] F. Martens,[137] Katchenowsky,[138] Landa,[139] Laveleye,[140] Beer Portugael,[141] and Kleen[142] have given the advantage of their influence to the movement for reform, an influence which has contributed much to determine the general tone of continental opinion.

6. English Opinion

The English tendency to disregard theoretical for practical considerations has been fully illustrated in the history of the question of inviolability in England. The treatise of Ward which was published in 1801 condemned the idea that commercial peace and military war are compatible and set the general lines which English theorists have since followed.[143] Manning in 1839 declared that "when war exists between two states, all the individual members of one state are the enemies of all the individual members of the other belligerent state . . .; no pacific relations can be entertained between them, unless under the provisions of express convention; all trade is suspended, no

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[133] *Cours de droit public interne et externe* (Paris, 1830), II, pp. 106–112, (Portuguese); cited by Boeck, p. 417.

[134] *De occupatio bonorum privatorum in bello maritimo* (1857) (Dutch); cited by Boeck, pp. 430–431.

[135] Review of E. Carron's "La course maritime" in *R. D I.*, 1875, VII, pp. 697–698; "Chronique du droit international" in *R. D. I.*, 1878, X, p. 26.

[136] *The Law of Nations* (Athens, 1861), II, pp. 424–434 (Greek); cited by Boeck, p. 460.

[137] *Les droits de la propriété privée pendant la guerre* (1869, Russian); cited by Boeck, p. 460.

[138] *Prize Law* (London, 1867), pp. 182–183 (Russian); cited by Boeck, pp. 460–461.

[139] *El derecho de la guerra conforme a la moral* (1877), II, pp. 116–122; cited by Boeck, pp. 461–462.

[140] *Du respect de la propriété privée sur mer en temps de guerre* (Brussels, 1875), and in *R. D. I.*, 1875, pp. 559–602.

[141] *Oorlogs-en neutraliteitsrecht* (The Hague, 1907), pp. 344–347.

[142] *Lois et usages de la neutralité* (Paris, 1900), II, pp. 689–691.

[143] *Treatise of the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs* (Repub. London, 1875) *Passim.*

contracts are legal, no debts can be enforced, and no suits sustained in courts of law, by or against an enemy."[144] Wildman,[145] Phillimore,[146] and Twiss,[147] similarly refuse to accept the continental formula upon the legal relationships created by war. Not so Lorimer[148] who admits that: "War being a public relation entered into by states in their political capacity, and for public purposes, and not by their private citizens for private purposes, the rights which war confers are public rights only." But he avoids the consequences which other writers have drawn from this maxim by asserting that the state may convert private rights into public, and private property into public, e. g., the state demands taxes, it may condemn a man's property on condition of payment at a value set by the state. Therefore, although belligerency does not entitle the belligerent to enforce a sale on the private owner, there can be no doubt that, in accordance with the law of nations, it entitles him to enforce purchase on the state of which the private owner is a citizen. From these premises, Lorimer works out his plan of state indemnification for the losses of private citizens, owners of property captured by the enemy, a plan which, while freeing particular individuals from unjust burdens at the same time converted the losses from an indirect into a direct means of pressure working in the interests of peace. Lorimer did not desire the abolition of capture which he held to be the least dangerous to life and to morals of all forms of warfare, a real means of economic pressure, and to England a right which could affect no injury to her carrying trade that could not be covered by "the merest trifle of increased insurance," while "as the maritime trade of the opposite belligerent would be annihilated, it is probable that the belligerent value of the retention of the right would greatly outweigh any loss which [England] should sustain from neutral competition."

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[144] *Law of Nations*, p. 166.

[145] *Institutes of International Law* (London, 1849), II, p. 8.

[146] *Commentaries upon International Law*, III, pp. 120–122.

[147] *Law of Nations*, II, p. 141 ff.

[148] *The Institutes of the Law of Nations* (Edinburgh and London, 1883–1884), II, p. 93ff.

Lorimer thus suggests that insurance may render his own plan unnecessary. In so doing he was undoubtedly taking too sanguine a view of the effect of war or rumors of war upon insurance rates, and the wisdom of such a plan as that developed by him was affirmed by the report of the *Royal Commission on the Supply of Food and Raw Material in Time of War.*[149]

This idea, though one for municipal and not international law to develop, has an interest which may justify the observation that the natural reluctance of a government to undertake unnecessary expenses would probably be too strong to be overcome. Commerce being a profitable undertaking, especially in time of war, it is doubtful whether merchants would ever be driven to cover to such an extent as to make it necessary for a country, in order to obtain what it needs by sea, to encourage them by offers of indemnity. On the other hand, no government would wish to indemnify, if the enemy had gained such pronounced supremacy as to render the capture of an adventurous merchantman practically certain.

Sheldon Amos was the forerunner of English writers more encouraging to the partisans of immunity, seeing in war a struggle between states and noting the tendency toward a more merciful treatment of enemy property at sea.[150] Contemporaneously with his lectures there were published two books by members of the Maritime League for the Resumption of Naval Rights in Great Britain, which not only refused to consider immunity, but demanded the renunciation of the Declaration of Paris.[151]

The list of English writers might be greatly extended.[152] For

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[149] *Parliamentary Papers,* Cd. 2643, sec. 266, 1905. See postea. B.

[150] *Lectures on International Law* (1874), IV and VI; see Boeck, pp. 546–547.

[151] Johnstone, *Handbook of Maritime Rights* (London, 1876), pp. 25–142; cited by Boeck, pp. 547–548; Bowles, T. G., *Maritime Warfare* (2nd ed., London, 1878); see Boeck, pp. 548–549; *Sea Law and Sea Power* (London, 1910), also by Mr. Bowles, vehemently attacks the movement for immunity. On August 8, 1914, Mr. Bowles urged that England should renounce the Declaration of Paris (*Times,* London, August 8, 1914, p. 9). Professor Holland replied that the suggestion was one against which it was superfluous to argue since the rules of the Declaration had met with general acceptance for nearly sixty years. (*Times,* London, August 14, 1914, p. 7.)

[152] The monographs of Bentwich, Norman, *The Law of Private Property in War* (London, 1907); of Latifi, Alma, *Effects of War on Property* (London, 1909); and of Loreburn, Earl, *Capture at Sea* (London, 1913); and the

the purpose of obtaining a correct estimate of professional opinion in England today the views expressed by Hall, Westlake, and Lawrence will suffice, those of Oppenheim having already been noted.[153]

Hall condemns the doctrine that war is a relation simply between states (1) as being a fiction which rests upon an impossible "distinction between the public and private aspects of the individual" and (2) as being "mischievous," in that it is deliberately made the "false basis" of the argument which brands "a practice as an iniquitous contravention of rule, which in reality is in harmony with the ground principles of the laws of war."[154] In answer to the assertion that it is unjust to retain this last exception to the principle of immunity he points to the subjection of private individuals to contributions and requisitions. To the argument for the application of greater humanity to sea warfare he replies that not only is capture more mild in effect than requisition, but that it is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be.

Writing in 1875 the same writer had analyzed the international situation and drawn from it the conclusion that the preponderance of opinion in favor of inviolability was such as to justify Great Britain in renouncing her traditional policy. "So far as the immunity of hostile private property at sea is concerned, the answer to the question [the advisability of accepting innovation] depends in the main upon whether England will do more harm to her enemies by capturing their property than she will by losing her own."[155] But another and important consideration was the

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pamphlets of Hirst, F. W., *Commerce and Property in Naval Warfare* (London, 1906); of "Mancunian", *The Freedom of Commerce in War* (London, 1914); and of Macdonnell, Sir John, *Some Plain Reasons for Immunity from Capture of Private Property at Sea* (London, 1910) are concise and quite readily available. That of Cohen, Arthur, *The Immunity of Enemy's Property from Capture at Sea* (London, 1909) is often quoted but is apparently difficult to obtain even in England and has not been accessible to the writer.

[153] Antea, p. 85.

[154] *International Law*, 6th ed., edited by J. B. Atlay (Oxford, 1909), pp. 63–70.

[155] "On Certain Proposed Changes in International Law", in *Contemporary Review*, 26, 1875, p. 737.

"weight and bulk of opinion. Neutrals will not throw their sword into the scale for the sake of an abstract principle; but their interests will be directly affected to the extent that their trade with the belligerent whose ships are captured is carried on in his vessels and by his merchants. They may suffer by the privation of commodities which are necessary to their comfort, or to the existence of their industries; and their traders may see their profits disappear in the forced sales which they are practically reduced to make when vessels laden with their goods are captured and taken into the ports of a country which is not their intended market. If the injury which they receive is not enough to move them to active interference, their neutrality will become malevolent, and an inclination to embarass the power which hurts them will grow, the more that they look upon the mischief which is done to them as unnecessary, and the motive which causes its infliction as unjustifiable".[156]

Hall regarded the governments and publicists of Russia, Germany, Austria, Italy, and the minor states as at that time ready and anxious to obtain the general adoption of inviolability.

Answering the ultimate question, that of the direct effects of capture in war, Hall contended: (1) that England's navy was inadequate both to give battle and to defend her enormous commerce; (2) that English commerce, being essential to England's existence, was more sensitive than that of any other country; the effects of uncertainty shown by the rise of insurance rates to a prohibitive level, and in the transfer of ships to neutral registry, would be more severe if England were at war than they had been in the American Civil War. Granted that in the meantime the shipping of her enemy would be ruined, the relative unimportance of that industry to any country except England would mean a correspondingly less significant injury to it; (3) that England's dependence upon other countries for her food and raw materials was absolute, and that these articles could not be obtained by the use of neutral ships at the beginning of a war if indeed at any time; that this was not true of any of her possible opponents. His general conclusion was: "The fact is, whether we like to face it or not, that in a purely maritime war England can reap little profit and might find ruin."[157]

In his later work Hall comments briefly upon this article:

[156] *Ibid.*, p. 739.
[157] *Ibid.*, pp. 743–751.

"The reasons which were then urged have grown stronger with each successive year; and the dangers to which the practice would expose the country are at length fully recognized."[158]

Lawrence regards it as axiomatic that capture cannot be consistently attacked on humanitarian grounds by those who carry on land warfare. And he contends that the facts need only be remembered to enable one to traverse the contention that war is simply a relation of state to state.

The decision for or against the abolition of capture must be made—since capture is relatively, if not absolutely, inhumane—after balancing the acknowledged moral gain that would acerue against the influence of capture in shortening and preventing wars. To the generality of states today capture would not operate as a potent means of offense nor would it cause them to discontinue fighting. To certain states such as the United States the right would be of minor importance, to such as Norway it might be fatal.

The considerations that must move England, says Lawrence, are (1) that neutral shipping would not be capable of carrying British commerce and that, even if neutral capital could finance the purchase of British vessels, the enemy would refuse to recognize their transfer as valid; and (2) that since she must continue to carry on the greater part of her commerce herself, it is absolutely essential that England be able so to minimize risks as to prevent panic freight and insurance rates.

Lawrence doubts the ability of the English navy to maintain such continuous control of the routes of commerce as to assure the safety of commerce. And he points out the uselessness of capture against weak mercantile powers and the superiority of blockade against an insular power. But he undoubtedly lays too much stress upon the sanctity of international agreements and upon the permanence of the Declaration of London, to which he looks for a prevention of any "great stretching of the law of contraband and blockade."[159] Based upon these arguments his conclusion "that on the whole the proposed change would be beneficial" is less encouraging than partisans of immunity would desire.

[158] *International Law*, p. 442.

[159] *Principles of International Law*, 5th ed., (London, 1913), pp. 499–508.

Westlake dissociates the question of immunity from any theory of the relations between states and their subjects; the "justification [of capture] must lie in its effect on the fortunes of a war." For England the most important aspect of the problem is that of the means which capture provides for preventing an invasion by the capture of possible transports and their crews.[160] The argument which is based upon the probable transfer of British ships to neutral registry he holds to be ineffective for practical reasons, such as we have already noted; that which points to England's economic dependence is weak in that it fails to provide for probable extensions of blockade and contraband; neutrals are to be considered, but their complaints do not become dangerous if wars are short; it is illogical for a state to demand that sequestration replace capture while refusing to indemnify its own nationals.

In view of these facts, and since, further, the liability of distress is being constantly reduced by the development of insurance, and because the use of steam has lessened the danger of capture which has never proved fatal in past wars "there does not . . . seem any sufficient reason why England should promote the immunity of private property at sea from the burden of military necessity, which lies heavy on private property on land in the shape of requisitions and contributions."[161]

These three arguments, then, place little emphasis upon the capacity for offensive operations which capture provides to the greatest of naval powers. Hall and Lawrence, while assuming that Great Britain would in any war eventually gain control of the seas, consider the dangers of an interim period too great to be compensated for later, especially (in the view of Hall) when the ultimate gaining of supremacy is likely to result in arousing neutral hostility. And Westlake regards capture not so much as a direct weapon of offense as an indirect one of defense.

A third aspect of the question is given most attention, i. e., the importance of capture as a means of offence *against* England. As we have seen, Westlake declines to accept the gloomy

[160] The right to imprison the crew of a merchant vessel has been rendered doubtful, to say the least, by XI H. C. Art. 6; see Scott, *H. P. C.*, II, p. 467.
[161] *International Law* (1907), II, pp. 130–132.

deductions of Hall, whereas Lawrence enlarges upon them. We have already observed that Oppenheim is a partisan of capture. In view of this contrariety of opinion, the question of what policy may be best for Great Britain to advocate may well be considered difficult of determination.[162]

7. American Opinion

The opinions of publicists in the United States are of interest in contrast with the consistent policy of our Government in favor of immunity. The foremost among them, Wheaton, justifies capture without reference to the peculiar circumstances of his own country.[163] Halleck also follows the English school.[164] Dana, Mahan, and Stockton have taken a position of hostility to the proposed reform. Dana bases his view upon general considerations regarding the nature of private property at sea.[165] Stockton believes that the United States has now no interest in procuring inviolability and that the right of capture should be retained as a preventive of war.[166] Mahan refutes the attempt at drawing an analogy between property on land and at sea; the latter he declares is "not private property in the ordinary sense of the word" but is "engaged in making money for the state." To interfere with external commerce "conduces directly to the ends of the war by producing a bloodless exhaustion, compelling submission, and that at the least expense of life and suffering." In the same connection he says:

> "In view of the limitation of their means, otherwise, for enforcing their necessary policy they [sea powers] should at least delay, and maturely weigh the general question, before, in deference to supposed particular advantage, they pledge themselves antecedently to the greater immunities now clamorously demanded".[167]

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[162] Professor Holland has expressed an opinion unfavorable to the prospects of immunity. For his opinion see article by Admiral Stockton in *A. J. I. L.* (1907), pp. 935–936.

[163] *Wheaton's Elements of International Law* (1836), edited by Coleman Phillipson (London, 1916), p. 569.

[164] *Halleck's International Law* (1861), Baker's ed. (London, 1908), II, pp. 1, 98.

[165] J. B. Atlay's Edition of *Wheaton* (London, 1904), p. 498.

[166] *Outlines of International Law,* (New York, 1914), pp. 340–343; "Immunity from Capture" in *A. J. I. L.*, 1907, pp. 930–943.

[167] *The Problem of Asia* (Boston, 1900), pp. 51–54.

On the opposing side of the question in the United States the writings of Lieber,[168] Dudley Field,[169] Woolsey,[170] Butler,[171] and Professor Hershey,[172] may be cited as representative.

Finally, it should be noted that the learned Argentinian publicist, Calvo, has urged the proposition of reform.[173]

Discussion of the facts and tendencies which are emphasized in the history of the theory of immunity will be left to a later chapter. The conclusions to which the study of theory leads may be rendered more practical by observing the activities of public and private agencies, to some of which the proposed reform has appeared worthy of consideration, to others essential. This purpose the second part of this chapter aims to serve.

B. Public and Private Proposals for Reform

Previous chapters have outlined those projects, for complete or partial acceptance of the principle of respect for private property at sea, which succeeded in becoming a part of the practice of certain states. This portion of the present chapter will present a sketch of the more important concerted efforts which have been made at intervals by legislative, commercial, and scientific bodies, efforts which, though not to be ranked with those previously examined, undoubtedly have contributed more than can be estimated to the successful entrance of the latter into practical affairs.

On May 29, 1792, Deputy Kersaint of Paris laid before the *Corps Législatif* a proposal to suppress, without condition of reciprocity, both privateering and capture by public armed ves-

[168] "Reflexions et projèts à propos de ventes d'armes," etc. in *R. D. I.*, 1872, p. 467ff.

[169] *Outlines of an International Code*, 2nd ed. (New York, 1876), pp. 526–530.

[170] *International Law*, 6th ed. (New York, 1890), pp. 239–240.

[171] "Freedom from Capture" in *N. A. R.*, CLXVIII, p. 55; "Immunity of Private Property" in *Report of International Law Ass'n* (1900) p. 66 ff. Mr. Butler compiled (in 1898) a list of documents concerning inviolability which were transmitted by the Secretary of State to the representatives of the United States at the first Hague Conference. (*Doc. of State Department*, May 20, 1899).

[172] *Essentials of International Public Law* (New York, 1912), p. 441, n. 56.

[173] *Le droit international* (Paris, 1896), 5th ed., IV, p. 332 ff., VI, pp. 504–505.

sels. In view of the contrary practice of enemy nations M. Granet proposed to abolish both practices on condition of reciprocity only; M. Lasource wished to abolish privateering only, while a fourth proposition recommended proposals to other states to that end. The debate, though mainly concerned with privateering, included an exposition of the arguments for and against prize in general, and was terminated by the adoption of a resolution asking the executive to negotiate with foreign powers for the abolition of privateering. To the circular sent out, the United States was the only great power to reply in a favorable sense. Hamburg, Bremen, and Lübeck gave their unconditional adherence. The French Government, therefore, on January 7, 1793, decreed the maintenance of privateering.[174]

The Panama Congress of 1826 did not accomplish any material result in the direction of immunity.[175] Calvo says, however, that its work constitutes, by its general tendencies, one of the historical antecedents of the doctrine proclaimed thirty years later by the Congress of Paris.[176]

With the signing of the Declaration of Paris there began in England the struggle between the partisans of the rules which it contained, who frequently desired further advance, and those who believed that England should maintain the ancient practice. Cobden, on November 8, 1856, wrote to the Manchester Chamber of Commerce a letter in which he expresed regret that England had not herself taken the initiative in proposing the more complete reform advocated by Marcy.[177] On November 10 of the same year Lord Palmerston assured the Liverpool merchants of his satisfaction with the Declaration and of his belief that complete freedom from capture would soon be accorded to commerce, adding the oft-quoted declaration that there had been no historical instance of the conquest of an important power by inflicting losses upon individuals.[178] Yet by 1860 Palmerston's attitude had changed and he replied to a deputation of English merchants, who urged him to sustain before Parliament the abo-

[174] Boeck, pp. 62–69, gives the documents.
[175] Butler, "Immunity of Private Property" in *Report of I. L. A.* (cit.), p. 63, n. 42.
[176] *Droit international*, IV, p. 335.
[177] Boeck, p. 423.
[178] *Ibid.*, p. 425.

lition of capture, that a maritime power like England could not renounce any means of weakening its enemy.[179]

As early as 1857 the question of the effect that the Declaration of Paris would have upon English maritime power had been raised in Parliament. In that year Mr. Lindsay and Mr. Bentinck expressed their distrust as to the wisdom of England's accession. And Lord John Russell, while maintaining that it was beyond the power of England to withdraw from the Declaration of Paris, uttered opinions that show how great a pressure of foreign influence must have been required in order to bring England to an acceptance of the Declaration. Lord Russell believed with Mr. Lindsay that the principle of the second rule of the Declaration was wrong. He said:

"I quite agree that the way in which we have been able to finish wars with great Powers, especially with France, has chiefly been by destroying the enemy's trade. We have brought the Powers with which we have been at war to such a state that their finances have become disordered. They have been ready to listen to terms of peace, and thereby the wars have been terminated. But now, if we were at war with America, or France, they could maintain their trade in full vigor, because manufactured produce throughout the world could be sent in neutral vessels in perfect safety".[180]

The agitation intended to bring about England's repudiation of her signature to the Declaration was resumed in Parliament in 1874 and again in 1877. The question has, however, been so definitely settled in a sense contrary to that agitation as to render further notice out of place here.[181]

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[179] *Ibid.*, p. 124.

[180] *Hansard,* 3rd series, CXLVI, (July 14, 1857), pp. 1486–1492.

[181] Important discussions on the Declaration of Paris occurred in the House of Commons on August 5, 1867 (*Hansard,* 3rd Series, CLXXXIX, pp. 878–884), April 13, 1875 (*Ibid.*, CCXXIII, pp. 822–864), and March 2, 1877 (*Ibid.*, CCXXXII, pp. 1262–1343). These vehement debates led Dr. Louis Gessner in his *Zur Reform des Kriegs Seerechts* (Berlin, 1875), an abridged translation of which appeared in *R. D. I.* 1875, VII, pp. 236–255, to criticise somewhat harshly the attitude of British statesmen toward reform of maritime law. To this arraignment, Westlake replied (*R. D. I.*, 1875, pp. 256–268), asserting that, excepting Lord John Russell, not a single Liberal Minister had expressed the desire to withdraw from the Declaration of Paris and naming from among these ministers Palmerston, Clarendon, G. C. Lewis, the Duke of Argyle, Granville, Grey, Selborne, Gladstone, and Bright. Among the Conservatives Northcote and Derby had declared for the maintenance of the Declaration, while Disraeli, Salisbury and Carnarvon, though

In the same period two important debates took place in the House of Commons upon resolutions looking toward immunity. On March 11, 1862, Mr. Horsfall introduced the motion: "That the present state of International Maritime Law, as affecting the rights of Belligerents and Neutrals, is ill-defined and unsatisfactory, and calls for the early attention of Her Majesty's Government." The motion was strongly opposed by the Government and was finally withdrawn.[182] On March 2, 1866, Mr. Gregory proposed, but after the debate withdrew, an amendment to the above motion of Mr. Horsfall, to the effect: "That an humble address be presented to Her Majesty, praying that she will be graciously pleased to use her influence with foreign Powers for the purpose of making the principle that private property should be free from capture by sea a maxim of International Maritime Law."[183] In the same year a commercial convention at London placed itself on record as desirous of immunity.[184]

On the continent similar manifestations were taking place. In 1859 a conference of German merchants at Bremen passed resolutions favoring the inviolability of persons and property at sea in time of war. This was adhered to by the Chambers of Commerce in many German and English cities.[185] In 1860 M. Ronne introduced into the Prussian Landtag a motion expressing the hope for governmental action with a view to increasing the prospects of legal immunity, but no vote was taken.[186] In 1868 the Diet of the North German Confederation adopted unanimously a motion of Dr. Aegidi in a similar sense.[187]

In France the question of immunity received considerable attention in the years immediately preceding the war of 1870–

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opposing it on principle, had not supported the motion of 1875 looking to its repudiation.

[182] *Hansard,* 3rd Series, CLXV, pp. 1359–1391, pp. 1599–1706.

[183] *Hansard,* 3rd Series, CLXXXI, pp. 1407–1480.

[184] Laveleye, in *R. D. I.,* (1875), pp. 573–574.

[185] Calvo, IV, pp. 338–339.

[186] Laveleye, p. 572.

[187] "Le chancelier fédéral est invité à profiter des relations amicales actuellement entretenues avec les puissances étrangères pour provoquer des négociations dans le but d'élever par voie de conventions d'État à État,. la liberté de la propriété privée sur mer en temps de guerre à la hauteur d'un principe reconnu de droit international"; Laveleye, p. 574.

1871. On April 11, 1866, before the *Corps Législatif*, Deputy Garnier-Pagès moved for public action to bring about immunity.[188] On July 17, 1870 he introduced a bill to provide that

"La France déclare inscrire dans son code maritime les dispositions suivantes:

"Art. I. Sont abolies la capture et la prise par les bâtiments de l'État des bâtiments de commerce ennemies, appartenant à des nations qui, avant la déclaration ou les faits de guerre, auront accepté ou accepteront la reciprocité."

The proclamation of the King of Prussia issued on the following day, renouncing the right of capture for the war about to begin, did not assist the bill, which failed of passage.[189]

The Brussels Conference of 1874 to which fifteen states sent delegates, failed to include the first two of the "principes généraux" submitted by the Russian Government, which embodied the idea that war is a relation of states only.[190] In deference to the wishes of the British Government, the Conference did not discuss the reform of maritime law.[191] Moved by the desire to preserve the remainder of her maritime rights, England refused even to participate in a second conference which it was proposed should be held at St. Petersburg.[192]

The Institute of International Law in 1874, the year of its founding, appointed a commission for the study of the question of immunity. To this commission one "general preliminary question" was addressed along with a number of "special questions". The general question inquired whether "there exists in the nature of things a principle of reason or law upon which there could be founded a distinction between the treatment of private enemy or neutral property in maritime warfare, and the treatment of the same property in land warfare".[193] To this question the reply was a unanimous negative.[194] The commission recommended the adoption of the formula used by the Gov-

[188] Boeck, pp. 127–128; Laveleye gives April 13 as the correct date.
[189] Laveleye, p. 575.
[190] Rolin-Jaequemyns, G., "Chronique du droit international" in *R. D. I.* VII, (1875), p. 97.
[191] Gessner, in *R. D. I.*, (1875), p. 239.
[192] *Ibid.*, p. 239; Hall, *Contemporary Review*, 26, p. 737.
[193] *R. D. I.*, (1875), p. 553.
[194] *Ibid.*, p. 603.

ernments of Prussia, Austria, and Italy in 1866: "Les navires marchands et leurs cargaisons ne pourront être capturés que s'ils portent de la contrebande de guerre ou s'ils essaient de violer un blocus effectif et déclaré". This formula was adopted by the institute in the session of 1875 at the Hague, with a reservation concerning merchant ships "que, directement ou indirectement, prennent part ou sont destinés à prendre part aux hostilités".[195]

In 1877, in session at Zurich the Institute adopted extremely liberal resolutions regarding the treatment of private property in maritime warfare:

1. "La propriété privée neutre ou ennemie naviguant sous pavillon ennemi ou sous pavillon neutre est inviolable.

2. "Sont toutefois sujets à saisie: les objets destinés à la guerre ou susceptibles d'y être employés immédiatement. Les gouvernements belligérants auront, à l'occasion de chaque guerre, à déterminer d'avance les objets qu'ils tiendront pour tels. Sont également sujets à saisie les navires marchands qui ont pris part ou sont en état de prendre immédiatement part aux hostilités, ou qui ont rompu un blocus effectif et déclaré".[196]

In its session of 1882 at Turin the Institute adopted, as the fourth article of the *Dispositions Générales* in its *Réglement International des Prises Maritimes:* "La propriété privée est inviolable, sous la condition de réciprocité et sauf les cas prévus au Sec. 23". Article 23 declared under what conditions the seizure of enemy or neutral ships or cargoes should be legal, making no distinction between enemies and neutrals.[197]

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[195] Session de La Haye, *Annuaire de l'Institut,* I (1877), pp. 118–119.

[196] *Annuaire,* II, p. 152; also see 55–113.

At Zurich the Institute named a commission of sixteen members to prepare a report upon the law of maritime prize. M. Bulmerincq's exhaustive report may be found in *R. D. I.,* (1878), pp. 185–268, 384–444, 595–655 (analysis of the law of prize in the principal states); and in *R. D. I.,* (1879), pp. 152–215, 320–358 (the theory of the law). Based upon this report is Bulmerincq's treatise: *National Laws and a Project for International Regulation of Maritime Prize,* R. D. I., (1879), pp. 561–650; (1880), pp. 187–205; (1881), pp. 447–515; (1882), pp. 114–190. The *Réglement international des prises maritimes,* constructed largely upon Bulmerincq's work, was adopted in sections by the Institute in its sessions of 1882 at Turin, *R. D. I.,* XIV, pp. 601–609, of 1883 at Munich, *R. D. I.,* XV, pp. 607–611 and of 1887 at Heidelberg, *R. D. I.,* XIX, pp. 348–353.

[197] A. R., in *R. D. I.,* XIV, (1882), pp. 602, 604.

In 1912 at Christiania the Institute determined *inter alia* with regard to the *Manuel* about to be issued on the law of war at sea that: "l'Institut maintient fermément sa résolution antérieure en ce qui concerne l'abolition de la capture et de la confiscation de la propriété privée ennemie dans la guerre maritime."[198]

In order to show due deference to actualities, the resolution of 1912 contained a *voeu* that the Commission appointed by it should construct two manuals, one to provide for the regulation of maritime warfare under the rules of capture, the other to assume the actual existence of immunity. The Commission in 1913 presented a *Manuel* founded upon the right of capture, which was adopted by the Institute in its session of that year at Oxford.[199] Article 33 provides: "Les navires publics et les navires privés, de nationalité ennemie, avec les marchandises ennemies, publiques ou privées, qui existent à leur bord, sont sujets à *capture*, c'est à dire *à saisie entrainant confiscation*".[200]

The Interparliamentary Union voted in its session of 1910 at Brussels: "1. Qu'on convînt aux Conférences prochaines de respecter l'inviolabilité de la propriété privée sur mer".[201] The members from England, France, and Russia were requested to make representations to their Governments with a view to bringing about a change of attitude upon the question. The English members were unable to do so, being fully engaged in efforts to obtain the assent of their Government to the Declaration of London. M. Maurice Colin brought the question before the French Parliament on January 16, 1911, and it was accorded the approval of M. Pichon, Minister of Foreign Affairs. M. Elfremoff in the Duma requested that the question of immunity be

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[198] *Annuaire*, 25, (1912), p. 600; Rolin, Albéric, in his report of this session, *R. D. I.*, 2nd Série, XIV, (1913), p. 543, observes: "Il est remarquable que c'est pour la troisième fois [it was actually the fourth instance] que *l'Institut*, composé d'éléments différents, maintient avec fermeté le principe de l'inviolabilité de la propriété privée dans la guerre maritime".

[199] *Annuaire*, 26 (1913), pp. 610–672.

[200] *Ibid.*, p. 618. The same article is rendered differently in the *Manuel* as published with the report of Jaequemyns, E. R., *R. D. I.*, 2nd Série, XV, (1913), p. 685: "Les navires publics et les navires privés, de nationalité ennemie, sont sujets à *capture* et les marchandises ennemies, publiques ou privées, qui existent à leur bord, sont passibles de *saisir*".

[201] Roszkowski, Gustave de, "L'union interparlementaire" in *R. D. I.* 2nd Série, XVI, (1914), p. 158.

made a subject for discussion at the third Hague Conference. The reply of the Russian Government is not known.[202]

The resolutions of the Interparliamentary Union, the members of which are in the main present or past members of national parliaments, would appear to have a practical significance and to provide a needed complement to those of the Institute.

The International Law Association discussed the question of immunity thoroughly in 1900 at Rouen, but came to no more advanced conclusion than that there was "no occasion to pass any resolution regarding the subject under discussion".[203] In 1906 the Association appointed a committee to consider the subject[204] and discussed the organizing of a convention of British merchants and lawyers, in order to learn their views with respect to inviolability.[205] Neither idea resulted in any important action being taken.

Within the last two decades the question of immunity has received large consideration in other than scientific assemblies. On March 4, 1892, a group of members of all parties in the Reichstag introduced a resolution requesting the Chancellor to make use of the cordiality then prevailing between nations in order to secure the recognition of immunity as a principle of international law. The Chancellor, Count Caprivi, replied that he would willingly undertake the task, were it not an impossible one to perform. Capture, he said, may become today the sole recourse for compelling an enemy country to submit by cutting off her commerce. And the character of modern merchant ships was such that they would have to be destroyed in order to prevent their use as auxiliaries to military operations.[206]

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[202] Roszkowski, Gustave de, "L'union interparlementaire" in R. D. I., 2nd Série, XVI, (1914), p. 174. The Union had voted in its conference of 1892 at Berne: "La Conférence prie ses membres d'engager les Parlements auxquels ils appartiennent d'inviter les gouvernements à faire reconnaître par une Conférence internationale le principe du droit des gens de l'inviolabilité de la propriété privée sur mer en temps de guerre." This resolution was voted again in the conference of the Union at the Hague in 1894 and at Christiania in 1899. See article by Roszkowski in *R. D. I.*, (1914), p. 24.

[203] *Report of the Rouen Conference of the I. L. A.* (London, 1901), p. 298.

[204] *Report of the Berlin Conference of the I. L. A.* (London, 1907), pp. 233–234.

[205] *Ibid.*, pp. 15–16.

[206] Calvo, VI, pp. 437–438.

On April 27, 1903, a Royal Commission was appointed in England to "inquire into the conditions affecting the importation of food and raw material into our United Kingdom . . . in time of war . . ."[207] This commission examined witnesses from chambers of commerce, members of produce commissions, grain companies, insurance companies, brokers' associations, expert agriculturists, Board of Trade officials, shippers, and professors of international law, and prepared a report in which is presented: (1) the position of the United Kingdom with regard to supplies and stocks of foodstuffs and raw materials in time of peace, (2) an estimate as to the effect of a maritime war upon British supplies and oversea trade, (3) an examination of the proposals regarding schemes for increasing the present stocks of wheat in the United Kingdom, and for insurance of war risks by the state, and (4) the conclusions of the commission.

The most important conclusion arrived at was that, due to the small supply of food normally on hand in the United Kingdom,[208] there would exist in time of war a real danger of a panic rise of prices which might so influence national opinion as to embarrass military operations.[209] The commission, however, held the naval and shipping evidence to be conclusive as to the point that "not only is there no risk of a fatal cessation of our supplies, but no reasonable probability of serious interference with them, and that, even during a maritime war, there will be no material diminution in their volume",[210] unless England should lose command of the sea.

No satisfactory conclusion was reached as to the best means of increasing the normal food supply. The commission expressed itself most definitely upon the usefulness of some system of national indemnity, to "operate both as an additional secur-

[207] *Parliamentary Papers*, (1905), 39, p. XI.

[208] " . . . it is safe to assume that the stock of wheat within the United Kingdom, which usually represents about seventeen weeks' supply in September, will not fall below seven weeks' supply, except in the month of August when it might be six and one-half weeks". *Parliamentary Papers*, (1905), 39, p. 58. On p. 59 it is stated that, supplies being drawn from all parts of the world, an enemy would find great difficulty in interfering with them effectively.

[209] *Ibid.*, p. 60.

[210] *Ibid.*, pp. 27, 59.

ity to the maintenance of our oversea trade and as an important steadying influence upon prices".[211]

The majority report makes no reference to any project for the alteration of international law. Paragraph 248 which may partially explain the indifference to any legal reform, has a greater interest today than when it was written:

"Turning to the position of this country in time of war, we think that it would be unwise to allow the safety of our supplies to depend too largely upon the observance of every rule of International Law by a hostile Power. At the same time we consider International Law to be one of the factors which will contribute in an important degree to the maintenance of our security by placing restrictions upon the operations of our enemies. An example will illustrate our meaning. It is no doubt true that the rules to the effect that the neutral flag covers enemies' goods except contraband of war, and that neutral goods unless contraband are free even when carried in a belligerent bottom, might conceivably be evaded by a declaration that foodstuffs were unconditionally contraband. *Such a declaration, however, would in itself be a violation of International Law, against which neutrals would be sure to protest, and, as recent experience has shown, with every prospect of success*".[212]

In 1908 a "Treasury Committee on a National Guarantee for the War Risks of Shipping", appointed on the recommendation of the commission, presented a report unfavorable to any system of national indemnity.[213] The immediate objects of a state guarantee which were considered by the committee included:

"(a) The maintenance of public confidence during war, and especially during the periods of uncertainty immediately preceding and succeeding the declaration of war.

(b) The encouragement to shipowners and cargo-owners to continue their business during such periods.

(c) The liberation of the Admiralty from the pressure of an uninstructed public opinion adversely criticising their strategic disposi-

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[211] *Parliamentary Papers*, (1905), 39, p. 62. On the same page the commission reports: "We look mainly for security to the strength of our navy; but we rely in only a less degree upon the wide-spread resources of our commercial fleet . . . and we believe that a guarded and well-considered scheme of National Indemnity would act as a powrful addition to our resources . . . ".

[212] *Ibid.*, pp. 58-59. (Italics by the writer).

[213] *Parliamentary Papers*, (1908), 58, Cd. 4161, pp. 3–50.

tions on the ground of commercial losses and possibly affecting detrimentally the conduct of the war.

(d) The removal of any temptation to lay up British ships or to transfer British trade and shipping to a neutral flag.

(e) The elimination of the amount by which war insurance would at such a time increase the cost of commodities.

(f) The maintenance of the supremacy of the British mercantile marine in time of war.

(g) The maintenance of our oversea supplies of food and raw material without an excessive rise in price".[214]

The dissenting member of the committee, Sir George S. Clarke, based his contention that state action was necessary upon his fear of

"the exaggeration of war risks leading to excessive and violently fluctuating insurance rates . . . From the national point of view, it is the overestimate of risk, with all the consequences involved, that has to be feared, not the actual captures, which, if the Navy is maintained at an adequate strength, and is effectively directed, will not reach such dimensions as to constitute a public danger".[215]

The majority report laid stress upon the importance of the Navy. Even though the merchant or shipowner was compensated by the state for his loss, that fact would afford no relief to the nation which was deprived of its supplies because of the weakness of its Navy. And if, under existing conditions, owners and merchants were liable to meet with heavy losses, they could also look for extraordinary profits. It would be unfair to ask the taxpayer to stand the losses while permitting the individual owners to retain the profits. The uncertainty of contraband lists, the increased burden upon the Treasury, the danger of frauds, and the administrative difficulties appeared to the committee sufficient, when taken together, to exceed any advantages which a scheme of indemnity might furnish.[216] The committee was even less favorable to any system of state insurance, i. e., a system toward the cost of which owners would contribute.[217]

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[214] *Ibid.*, p. 8.
[215] *Ibid.*, p. 44.
[216] *Ibid.*, pp. 39–42.
[217] *Ibid.*, pp. 20–26.

Since the Second Hague Conference there has been frequent discussion in England upon the question of immunity.[218] On October 8, 1912, the London Chamber of Commerce passed a resolution favoring reform.[219] On the thirtieth of the same month a similar resolution was passed at a conference for the promotion of a better understanding between England and Germany. Professor Eickhoff declared that Germany would be less concerned to increase her fleet if her expanding commerce were rendered secure from capture.[220] Throughout 1913 the question was discussed in letters to the *Times* and in Parliament. The discussion was concerned, to a continuously greater degree, with the relation of immunity to the reduction of armaments. The inconsistency of denying an enemy ship entrance to its home port and allowing it entry into a nearby neutral port was pointed out in Parliament. The imperative necessities of war might demand capture at sea at a time when the seizure of private property on land could be dispensed with. Insurance companies might lose much business in time of war but they "recouped themselves by the high rates they charged to cover war risks." Armament would not be reduced in England because the loss of one means of injuring the enemy would induce the demand for an increased army. There would remain, moreover, the recourse to visit and search on pretense of suspicion of contraband.[221]

The discussion was re-opened in Parliament on May 6, 1914. Mr. Morrell remarked, *inter alia,* that "having regard to the great amount of marine insurance that was done in this country it did seem absurd that the British fleet should be used to destroy commerce of which insurers here would have to pay the cost".[222] The reply of Sir Edward Grey has been characterized by M. M.

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[218] See *Hansard,* (1908), 183, pp. 1127–1179; (1909), 3, pp. 1599–1639; (1910), 15, pp. 457–472; (1911), 27, pp. 445–447.

[219] London *Times,* October 9, 1912, p. 10.

[220] *Ibid.,* November 1, 1912, p. 14. Sir John Macdonnell characterized as "Mahanism" that sentiment for capture which, "slurring over the moral issues and aspects of war, dwells upon its technique, and which, if it had its way, would revoke the Declaration of Paris".

[221] *Hansard,* (1913), 51, pp. 324–347. For comments by Professor Holland and Lord Sydenham, see *Times* (London), November 6, 1913, p. 7, and November 12, 1913, p. 7.

[222] This idea overlooks non-liability for the fulfillment of such contracts with an alien enemy.

J. Vallatton as "pas une opinion personnelle, mais le point de vue actuel du gouvernement britannique, qui paraît s'être enfin rendu compte de la nécessité de faire volteface et d'adhérer à l'abolition de la capture".[223] The Foreign Secretary declared that England's opposition to immunity had never been irreconcilable and that foreign countries had not taken advantage of the suggestion, thrown out by the British delegates to the Second Hague Conference, to propose reduction of naval expenditure on condition of the abolition of capture. Speaking with reference to instructions to delegates to the Third Hague Conference he said that England ought not to "pose as being the champion obstacle" to reform. But England would have to demand, as conditions, understandings regarding blockade, contraband, and floating mines. While refusing to accept the motion of Mr. Morrell, expressing the desirability of negotiations with other governments upon the subject of immunity, Sir Edward Grey concluded:

> "If it is understood that we must have conditions, I shall be prepared to take up the attitude that we shall not on the next occasion refuse to negotiate, but shall come forward ourselves with the actual conditions which we regard as essential and fair conditions in the matter with the possibility of a settlement".[224]

In May, 1914, was held in London a meeting of the Baltic and White Sea Conference of British and foreign shipowners. The President, Mr. W. J. Noble, made the assertion significant, from the viewpoint of neutral influence, that in any future naval war no belligerent could safely rely on its own mercantile marine for the conveyance of its necessary food supplies unless it was prepared to give a national indemnity. The Conference passed a resolution calling on the governments of the maritime nations to take into early consideration the question of the abolition of capture.[225]

It remains to take account of the treatment accorded the ques-

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[223] "De quelques conflits de coutumes de la guerre maritime" in *R. D. I.*, (1914), XVI, p. 289.

[224] *Hansard*, (1914), 62, pp. 367–411.

[225] *Times* (London), May 8, 1914, p. 21.

tion of inviolability in the two Hague Conferences.[226] At the Conference of 1899, the letter of the Delegation of the United States[227] was made the subject of a *voeu* of the Second Commission to the effect that the proposal of immunity made in that letter be placed upon the program of a later conference. The *voeu* was adopted by the Conference, Sir Julian Paunceforte, first delegate from Great Britain, abstaining from the vote on the ground of lack of instructions.[228]

The question was included in the Russian program for the Second Hague Conference and was submitted to the Conference by the American Delegation.[229] As formulated for the consideration of the Fourth Commission the proposition of the United States read:

"The private property of all citizens or subjects of the Signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said Signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers".[230]

M. Ruy Barbosa, first delegate from Brazil, in a speech prefacing that of Mr. Choate, declared that the decisive question to be decided was whether or not the right of capture was essential to maritime warfare. His own reply was in the negative, according with the traditional attitude of Brazil upon the question of immunity.[231]

The argument of Mr. Choate rested upon the doctrine which regards war as tending to become a struggle between states, concerning individuals only indirectly. Capture, he said, is a heri-

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[226] The question did not receive attention at the London Conference of 1908–1909. The work of that conference has, however, a direct bearing upon the prospects for immunity since a number of the articles of the Declaration of London, viz., articles 1, 18, 19, 28, 35, 40, 48, 51, 52, and 53 were framed to render nugatory the means which have been developed for evading the Declaration of Paris.

[227] See chapter three of this study.

[228] *Conférence internationale de la paix,* (1899), pp. 43–46.

[229] *Deuxième conférence internationale de paix,* (1909), III, pp. 750–779.

[230] *Ibid.,* p. 1141.

[231] *Deuxième conférence internationale de la paix,* III, pp. 746–750.

tage from ancient piracy.[232] To this statement M. Triana, delegate from Colombia, replied that war itself was simply organized murder.[233] He brought the discussion back to practical considerations: "Nous cherchons", he said, "à nous approcher de l'ideal autant que possible, mais chacun de nous, dans son cas, doit subordonner ses décisions aux besoins et aux intérêts de la Nation qu'il représente".[234] Sir Edward Fry, delegate from Great Britain, defended capture against the accusation of inhumanity.[235] M. Nelidow of Russia attacked the argument of the American delegate, Mr. Rose, who had sought to assimilate private property at sea to that on land. M. Nelidow declared also that invasion was itself a violation of private property.[236]

Mr. Choate used as his second line of attack the ineffectiveness of capture as a means of deciding wars.[237] He declared also that the expenditures necessitated by the policies of the naval powers condemned the maintenance of vessels destined to prey upon enemy merchantmen.[238] This argument is aimed at a man of straw. As Dupuis points out, the usefulness of cruisers in attacking enemy shipping is manifested not before, but after, victorious naval operations. While sporadic attacks on commerce are futile, once naval predominance has been gained cruisers are available for use in sweeping the enemy's commerce from the seas. For the conditions in which capture is of real utility, therefore, special war vessels adapted for attack on commerce are unnecessary.[239]

M. Barbosa attempted to prove that through insurance the blows aimed at enemy commerce would be diverted to neutrals.[240] Mr. Choate, viewing this phase of the question from another angle, declined to admit that the distribution of the loss

[232] *Ibid.*, p. 774.
[233] *Ibid.*, p. 792.
[234] *Ibid.*, p. 791.
[235] *Ibid.*, p. 800.
[236] *Ibid.*, p. 842.
[237] *Ibid.*, p. 773. For an extremely well reasoned consideration of this point, concluding in a sense partially contrary to the statement of Mr. Choate, see Dupuis, *Le droit de la guerre maritime*, pp. 65–70.
[238] *Deuxième conférence internationale de la paix*, III, p. 777.
[239] *Le droit de la guerre maritime*, p. 72.
[240] *Deuxième conférence internationale de la paix*, III, p. 783.

over the community by means of insurance would excite a general demand for peace.[241]

M. Renault outlined the reasons which would make it impossible for the French members of the commission to vote for the abolition of capture. A preliminary settlement of the questions of contraband and blockade would be necessary,[242] the differing nature of land and sea warfare rendered it possible to reconcile capture with the modern theory of war, granting that which one cannot admit, that the degree of respect shown for private property on land is prompted by any other sentiment than self-interest; the apprehension of warfare on commerce, which enables a belligerent to "arrest the economic life of his adversary" may be the determining factor in preventing a war, while capture in a war once commenced may induce a more speedy capitulation; capture today is not analogous to privateering, which enriched individuals at the expense of other individuals, but is a means by which one state strikes at the vital interests of another state; finally, capture enables a state to deprive its enemy of great steamships easily convertible into auxiliary cruisers.[243]

Sir Ernest Satow explained the attitude of Great Britain in refusing her assent to the proposal of the United States. So long as commercial blockade was retained, there would be danger that, in retaliation for supposed infraction of the right of blockade by one belligerent, the enemy government would put capture again into operation. But that Great Britain regarded the right of capture as a corollary of the state of war was revealed in the emphasis laid upon the reduction of armaments. If immunity is to be favored by England, war must first be made less probable.[244]

The adhesion of Russia was withheld on the ground that the way to a secure agreement had not been sufficiently prepared.[245] The Japanese delegation did not announce its reasons for not favoring the proposal. M. Larreta, for the delegates of Argen-

[241] *Ibid.*, p. 779.

[242] This point had been emphasized by the German delegation—*Ibid.*, p. 789—which, however, voted for the proposition of the United States.

[243] *Deuxième conférence internationale de la paix*, III, pp. 792–795.

[244] *Deuxième conférence internationale de la paix*, III, pp. 788, 832.

[245] *Ibid.*, p. 789.

tina, pronounced an unconditional support of the right of capture.[246]

The vote upon immunity showed that twenty-one states—Germany (with reservations above noted), the United States, Austria Hungary, Belgium, Brazil, Bulgaria, China, Cuba, Denmark, Ecuador, Greece, Hayti, Italy, Norway, The Netherlands, Persia, Roumania, Siam, Sweden, Switzerland, and Turkey—were favorable. Eleven states, Colombia, Spain, France, Great Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, and Salvador, voted in the negative. Chili abstained, and eleven states did not answer to the roll-call.[247]

The failure of any of the proposals to meet with success led the president of the commission, M. Martens, to propose the *voeu* that in case of future wars, the Powers engaged should follow the precedent set in 1866 and declare spontaneously whether they will, entirely or in part, renounce the right of capture during the war. Certainty, he thought, would result, and with it a diminished resistance to inviolability. The proposal was withdrawn, after being criticised as tending to infringe the sovereignty of individual states—a criticism that appears to Dupuis to lack both force and relevance.[248]

Mention should be made of the attempt to codify the customs which have been developing with regard to the treatment of enemy merchant ships at the outbreak of hostilities. The Convention of the Second Hague Conference which makes provision for the inviolability of enemy ships in the ports of the opposing belligerent or at sea at the outbreak of war is open to the criticism that the article which concerns ships in port is not mandatory, and that it leaves unsettled the number of days of

[246] *Ibid.*, p. 810.

[247] *Ibid.*, pp. 834–835. Brazil proposed to apply to maritime warfare the provisions of articles 23, 28, 46, 47, and 53 of the Second Hague Convention of 1899; Belgium proposed sequestration; Holland wished to exempt from capture ships bearing a passport certifying that they would not be put to military uses; France proposed the abolition of prize money and partial state indemnification: Great Britain, "animé", said Sir Ernest Satow, "du désir sincère d'alleger les neutres, dans la mesure du possible, du fardeau de la guerre", proposed the abolition of contraband. For the texts of these proposals see: *Deuxième conférence internationale de la paix,* III, pp. 1141–1144; for speech of Sir Ernest Satow, *Ibid.*, p. 788.

[248] *Deuxième conférence internationale de la paix,* III, pp. 844–846; Dupuis, *Le droit de la guerre maritime,* pp. 82–84.

grace that should be allowed. In that the Convention emphasizes the presumption that a belligerent will prefer to requisition rather than to allow to pass without interference enemy vessels and cargoes met at sea in ignorance of the outbreak of war, it sacrifices an ideal which had already attained the dignity of practice to the desire not to demand more than was likely to be accorded.[249]

From the evidence accumulated by this study of the historical development of the theory of and proposals concerning immunity, it appears impossible to draw a clear-cut conclusion as to the present status of the question. Without doubt the majority of publicists favor immunity. But if the arguments of the advocates of reform have convinced some who previously opposed it, it is no less true that there has occurred a partially compensating extension of the list of opponents. This seems to be due to the gradually increasing tendency of theorists to base their opinions upon the facts of the situation in general and of their own countries in particular.

This partial modification of the body of favorable opinion reflects the changed circumstances which the increased attention of continental states to the importance of colonies and commerce and, in consequence, of navies, represents. Simultaneously, public opinion in Great Britain has manifested a growing fear lest the next war in which that country should become involved would be lost on account of the starvation of her people or the apprehension of starvation. That the *Report of the Royal Commission on the Supply of Food and Raw Materials in Time of War* reassured the British people on this point appears to be borne out by the unfavorable attitude of the British delegates at the Second Hague Conference toward the proposal for the inviolability of private property from capture.

Finally, it may be noted that occasional publicists and statesmen have voiced the opinion that the question of capture is bound up, not only with the questions of contraband and block-

[249] *Deuxième conférence internationale de la paix*, I, pp. 644–646. The article of the *Convention Relative to Certain Restrictions with Regard to the Right of Capture in Naval War*, (*Ibid.*, pp. 665–666), which exempts the crews of captured enemy merchant vessels from being made prisoners, should have some influence upon the policy of nations, especially of Great Britain.

ade, but with the still more vital question of the reduction of armaments. They have pointed out that the future of immunity for private property at sea is dependent upon the future of war and peace.

CHAPTER V

PRIVATE PROPERTY AT SEA IN THE EUROPEAN WAR[1]

In accordance with the plan so far followed in the treatment of the practice of nations, the purpose of this chapter is two-fold. To record the action in observance of regulations *de faveur* intended to mitigate the existing right of capture will be a comparatively short undertaking. Of greater interest and importance is the study of belligerent activity tending to extend the right of capture and to nullify laws designed to act as limitations upon that right. The principal question to be answered in the second portion of the inquiry is that which has already been asked in regard to other wars since the Declaration of Paris. Have the second and third rules of that Declaration been observed? Have they stood the test of a great maritime war, or does the latest record of fact intensify the conclusions to be drawn from the American Civil War and the Russo-Japanese War?

The attitude taken toward the practice of granting days of grace to enemy vessels in certain circumstances at the beginning of a war is of more interest than formerly because of the formulation of that hitherto varying custom in the sixth Hague Convention of 1907.[2] On August 4, 1914, a British Order in Council was issued in which provision was made for acting in the manner declared to be "desirable" by the "Convention Relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities." To enemy merchant ships in the ports to which

[1] In this chapter the Special Supplement of the *A. J. I. L.*, 9, (July, 1915), containing diplomatic correspondence between the United States and belligerent governments will be abbreviated to *A. J. I. L., S. S.*, 1915.

[2] Although Servia and Montenegro have not ratified the Hague Conventions of 1907, the great Powers are professedly observing them. See the opinion of the British Prize Court in *The Möwe*, in *A. J. I. L.*, 9, p. 551.

the Order applied, or which had cleared from their last port before the declaration of war, and had entered one of the designated ports, in ignorance of the war, ten days were allowed in which to load or unload their cargoes and depart. Provision was made for ships arriving after the expiration of the ten day period—provided they satisfied certain requirements. Cable ships, seagoing ships designed to carry oil fuel, and ships of over 5,000 tons gross burden or of a speed of fourteen knots or more were to be excluded from the operation of the Order, as were "merchant ships which show by their build that they are intended for conversion into warships". Ships exempted by the Order were to be furnished with passes good only over prescribed routes.[3]

This Order was, however, to apply only on condition of reciprocal action by the German Government. The two short communications on the subject received from that Government appeared to expect an unconditional statement of British intention, before the German determination could be made. The result was a failure to come to an agreement and consequently to carry out the non-obligatory clauses of the Convention.[4] Both countries are observing the second article of the Convention, detaining, but not confiscating, enemy vessels found in port when the war began; these vessels and their cargoes were to be subject only to requisition.[5]

Article three of the above-named convention was not included, even conditionally, in the British Order and was not regarded

[3] Order in Council, Articles 3–8, cited in full by Bentwich, "International Law as Applied by England in the War", in *A. J. I. L.*, 9, (January, 1915), pp. 20–21.

[4] *Ibid.*, pp. 21–24. Canada followed the example of England. See Garner, J. W., "International Law in the European War," in *A. J. I. L.*, 10, (April, 1916), pp. 248–249.

[5] See "The Chile" in *A. J. I. L.*, 9, (1915), pp. 528–531. (*Times Law Reports*, 31, p. 3). The court did not finally determine the rights of the Crown nor the question whether Article 2 of the sixth Convention was dependent upon Article 1. For discussion of English cases see article by Garner, already cited, pp. 249–269. Professor Garner quotes the report of July 3, 1915, published by the British Navy League, according to which 171 German, Austrian and Turkish merchant vessels were found in British and Egyptian ports when war broke out. Subsequently 131 vessels of the three nations were seized prior to the publication of the report, the greater number of these at the beginning of the war; the total of enemy vessels captured by Great Britain up to July 3, 1915, was therefore 302.

as obligatory, as Germany had made reservations concerning it in 1907. Enemy ships which had left their home ports before war broke out and which were captured at sea in ignorance of hostilities were, therefore, confiscable and have been confiscated by British and French Prize Courts. German cruisers usually sank the prizes made under this article, while the British Prize Court interpreted the rights of the enemy under it very strictly.[6] For the purposes of the sixth convention, territorial waters were to be regarded as "en mer," and "port" as "a place where ships are in the habit of coming to load or unload."[7] The question whether neutral owners of property on the destroyed British vessels will receive compensation or not cannot be answered without the decisions, but compensation is hardly to be anticipated in view of continental precedents.

As between France and Germany, merchant ships, not indicating by their "construction, armament or affectation" that they were susceptible of being transformed into war vessels or used in the public service, were allowed seven days of grace in fulfillment of the first article of the convention above-named.[8] France accorded to Austria-Hungary the same privileges.[9] But enemy ships met at sea in ignorance of hostilities were captured, and were condemned with their cargoes, if enemy, by the French *Conseil des Prises*.[10]

Belgium granted three days *délai* to German merchant ships in her ports at the outbreak of war.[11] Presumably Germany reciprocated for this favor.

Great Britain and Austria engaged to allow ten days of grace to the ships of each in the other's ports when war began between them. Ships which did not avail themselves of the privilege of departure and ships met at sea in ignorance of hos-

[6] Bentwich, p. 24. He says that British cruisers captured nearly one hundred German ships, the inference from the context being that the captains of the latter were ignorant of the outbreak of hostilities. As illustrative cases see "The Marie Glaeser," in *A. J. I. L.*, 9 p. 531 ff., (*Times*, L. R., 31, p. 8); "The Mowe," *Ibid.*, pp. 547–553; (*Times*, L. R., 31, p. 46.)

[7] "The Möwe", in *A. J. I. L.*, 9.

[8] *R. G. D. I. P.*, 22, (1915), Documents, pp. 9–10.

[9] *Ibid.*, pp. 12–13. Presumably Austria acted reciprocally.

[10] *Ibid., Jurisprudence en matière de prises maritimes.* Cases of the *Porto, Barmbek* and others, pp. 1–12. No record of Russian treatment of enemy vessels at outbreak of war has so far been available.

[11] Garner, p. 248, n. 21.

tilities were to be detained or requisitioned in lieu of confiscation.[12]

Japan alone granted, on condition that like privileges were accorded by the German Government, the same *délai de faveur,* a period of two weeks, both to vessels found in her ports and to those which entered them or were met by her cruisers at sea in ignorance of the outbreak of hostilities.[13]

As between Great Britain and Turkey, privileges were granted by neither Power, Turkey, though she inaugurated the *délai de faveur,* not having ratified the Hague Convention which codified it.[14]

On May 30, 1915, Italy decreed the sequestration of "all enemy merchant ships lying in the ports and territorial waters of the Kingdom and its colonies at the outbreak of hostilities" and of "those enemy merchant ships which shall have left their last port before the declaration of war, and which are met at sea before they are aware of the commencement of hostilities." Vessels found upon examination to be "intended for conversion into warships" were to be captured and placed in the Prize Court; the remainder were to be subject to requisition. Enemy goods found on board were to be "sequestered and restored after the war without an indemnity, or else requisitioned with an indemnity."[15] This decree was justified in that Italy has never ratified the sixth Hague Convention of 1907.

In dealing with the effects of the application of certain rights of belligerents upon certain other rights of both neutrals and belligerents, with the purpose of discovering to what extent the present legal guarantees modifying the right of capture are effectual, it will be convenient to deal with the various belligerent countries separately, since the information available varies greatly with different countries. Fortunately the material is most readily accessible for the conduct of maritime operations by Great Britain, whose interest in the subject of our discussion has ever been paramount. Dupuis has written that the Russo-

[12] Bentwich, pp. 31–33.
[13] Garner, p. 248.
[14] *Ibid.*, p. 249.
[15] *Parliamentary Paper Miscell.,* No. 18, (1915), Cd. 8104, cited in *A. J. I. L.,* 10, (April, 1916), *Supp.,* pp. 111–113.

Japanese War converted England to the standpoint of neutrals,[16] and something has already been pointed out concerning the British attitude toward Russian and Japanese extensions of belligerent rights at that time. Has British practice since August 4, 1914, accorded with the British attitude in times when England has been a neutral?

A. British Practice in the European War

The Declaration of Paris received no reaffirmation at the beginning of the war by a British Order in Council. In his address at the opening of the Prize Court, the President, Sir Samuel Evans, stated that the rules of that Declaration would be enforced. But by Order in Council of August 20, 1914, the Declaration of London was declared to be placed in operation during the present hostilities, that policy having been agreed upon by the Allied Governments in order "that the naval operations of the allied forces so far as they affect neutral ships and commerce [might] be conducted on similar principles." Certain additions and alterations were laid down by which the rules of the Declaration were weakened. On August 6, 1914, the United States Government had instructed its ambassadors at London, St. Petersburg, Paris, Berlin, and Vienna, and its minister at Brussels to inquire as to the willingness of the governments to which they were respectively accredited to agree to a reciprocal observance of the Declaration of London. On August 13 and 22 replies were received from the embassies at Vienna and Berlin stating that the governments of Austria-Hungary and Germany would observe the Declaration on the condition proposed. On August 27 Ambassador Page sent to Washington the above-mentioned Order in Council. In view of Article 65 of the Declaration of London, which provides that the Declaration must be accepted as a whole, the United States Government, on October 22 and 24 respectively, informed Berlin and London that it felt "obliged to withdraw its suggestion" and therefore it would insist "that the rights and duties of the United States and its citizens in the present war be defined by

[16] *Le droit de la guerre maritime*, p. 22.

the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London.'"[17]

The exceptions introduced by the British Government which concern our study were: (1) the substitution of the British contraband list of August 4, 1914 for that contained in Articles 22 and 24 of the Declaration and (2) the abrogation of Article 35 of the Declaration by the assimilation of conditional to absolute contraband in so far as liability to capture under the doctrine of continuous transport as declared by Article 30 of the Declaration was concerned.[18] Thus at the outset, the British Government showed a willingness to follow precedents which had operated in previous wars with such injury to the efficacy of the second and third rules of the Declaration of Paris as to have led to the formation of the very rules of the Declaration of London which the Allied Governments were disregarding.

Both of the above-named exceptions to the Declaration were concerned with increasing the difficulties of enemy and neutral property in reaching enemy states; the first by extending the contraband list, the second by preventing the transit of conditional contraband through neutral ports. It will be profitable to follow the practice of the two principles concurrently.

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[17] For correspondence and Order in Council see *A. J. I. L., SS.*, (1915), pp. 1–8.

[18] Article 30 of the Declaration of London provides:

"Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails trans-shipment or a subsequent transport by land".

Article 33 provides:

"Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress".

Article 35:

"Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port". Cohen, A., *The Declaration of London* (London, 1911), pp. 102–109.

1. Contraband Lists

The Order in Council of August 20 does not offer large ground for criticism of its extension of the contraband list. Aircraft of all types were made absolute contraband, while the list of conditional contraband was left as determined by the Declaration of London.[19]

On September 21, 1914, there was proclaimed an extension of the list of conditional contraband by the addition of unwrought copper, lead in pigs, sheets or pipe, glycerine, rubber, hides and skins, ferrochrome, haematite and magnetic iron ores.[20]

On October 29, 1914, the contraband list was revised.[21] The new conditional contraband articles of the previous Order were, with the exception of glycerine and hides, made absolute contraband, and to the list were added sulphuric acid, range-finders, iron pyrites, nickel and nickel ore, aluminum, ferro-silica, barbed wire and implements for fixing and cutting the same, motor vehicles and their component parts, and mineral oils and motor spirit, except lubricating oils. The conditional contraband list was extended by the addition of sulphur and leather, undressed or dressed, suitable for saddlery, harness or military boots.

Again on December 23, 1914, the list of contraband was revised. To the absolute category were added a large number of ingredients of explosives, resinous products, several metals and ores, antimony, and submarine sound signalling apparatus. The conditional list was not extended.[22]

On the 11th of March, 1915, raw wool and woolen yarn, tin and tin ore, castor oil, paraffin wax, copper iodide, lubricants, hides, skins, and leather suitable for the manufacture of military equipment were made absolute contraband.[23]

While, in the main, the additions enumerated are of such importance for war purposes as to justify their being regarded as absolute contraband, many articles so listed are of considerable

[19] *Proclamation,* August 4, 1914, No. 1250, in *A. J. I. L., S. S.,* (1915), pp. 9–10.
[20] *Ibid.,* September 21, 1914, No. 1410, in *A. J. I. L., S. S.,* (1915), p. 11.
[21] *Ibid.,* October 29, 1914, No. 1613, in *A. J. I. L., S. S.,* (1915), pp. 12–13.
[22] *Proclamation,* December 23, 1914, in *A. J. I. L., S. S.,* (1915), pp. 15–18.
[23] *Ibid.,* March 11, 1915, in *A. J. I. L., S. S.,* (1915), pp. 20–21.

use in the arts. Among these may be noted copper, rubber, rosin, oil, wool, and tin, all of them properly to be regarded as conditional contraband by a Government which has taken the leading part in establishing the distinction between the two classes of contraband.

2. Seizure of Contraband—The Grounds of Seizure

Not until March 11, 1915, did Great Britain issue her Order by which the waters surrounding German ports and designated neutral ports were to be subjected to the control of the British Navy by means which will be outlined in the discussion of blockade.[24] Previously to this action, and while, therefore, access to German ports was free to conditional contraband, numerous American vessels with cargoes of foodstuffs had been seized while en route to German or neutral ports and conducted into British ports. This procedure was made the principal basis of complaint in the note of Secretary Bryan of December 26, 1914.[25]

The seizures were made upon grounds of suspicion that contraband was being transported either by means of concealment, or by the use of consignments made "to order" or otherwise, so as to disguise actual destination to a fortified place or to government contractors in enemy territory.[26] Thus we find immediately that the belligerent's right to prevent contraband from reaching his enemy is being exercised through the application of the coöperating principles of "continuous transport" and "visit and search." The circle is readily traced. Belligerent *A* cannot legally interfere, so long as a blockade has not been established, with enemy goods *per se* proceeding to enemy territory in neutral ships. His first recourse is to the extension of the contraband list. The shipowners and cargo-owners attempt to evade him by using neutral ports. His second offensive de-

[24] See pp. 191–201, *infra.*

[25] See cases, p. 184 ff., and note of Secretary of State Bryan to Ambassador Page of January 7, 1915, in *A. J. I. L., S. S.*, (1915), pp. 55–60.

[26] See page 168.

fence is the principle of continuous transport. He insures the effectiveness of the latter by applying it both to absolute and to conditional contraband. He further approximates the position of conditional to that of absolute contraband by erecting against it harsh presumptions of hostile destination. Finally on pleas of suspicion and of the impossibility of adequate search of modern merchantmen, belligerent *A* conducts the neutral vessels with their cargoes into his own ports, there to be detained until his determination as to their disposition shall be made. The possibility of encroachment upon the rights of neutrals and of the opposing belligerent (for international law must maintain those rights which it has confirmed for belligerents as well as for neutrals) is immediately apparent. But belligerent *A* is to be judged by what he does, not by what he could do. In attempting to understand belligerent methods, the necessity of keeping in mind the inter-dependence and inter-action of various belligerent rights in the process of the apprehension of enemy property at sea is apparent.

Before discussing the cases which arose out of the application of the British regulations, it should be noted that by a decree of January 25, 1915, the German Bundesrath unwittingly enabled the British Government to complete its defences against the introduction of the most important variety of conditional contraband into Germany. The German decree placed the supply of grain and flour within the Empire under governmental control. The decree was almost immediately altered so as to apply only to the domestic supply, leaving imported foodstuffs in private hands.[27] The British Cabinet, however, asserted that

"in any country in which there exists such a tremendous organization for war as now obtains in Germany there is no clear division between those whom the government is responsible for feeding and those whom it is not," and that "the reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed

[27] Garner, "Some Questions of International Law in the European War, VI," in *A. J. I. L.*, 9, (April, 1915), p. 384.

forces or enemy government disappears when the distinction between the civil population and the armed forces itself disappears".[28]

The Cabinet was thus taking the position that the German decree had recognized the necessity of conserving the supply of flour and grain and that this recognition justified Great Britain in regarding foodstuffs as absolute contraband. Probably this action would have been taken without the decree of the Bundesrath since the British Government had adopted measures of a similar nature and since the basis of the act is the recognition of altered circumstances.[29]

3. Seizure of Contraband—The Cases Prior to March 1, 1915

The seizures of absolute and conditional contraband in neutral vessels found in the belligerent's ports or on the high seas at the outbreak of war, when the owners were ignorant of the outbreak of hostilities, were dealt with in accordance with Article 43 of the Declaration of London, the cargoes being condemned, subject to the payment of compensation.[30]

The cases, which have been published, involving interference by Great Britain with neutral vessels and their cargoes prior to March 1, 1915, may be most conveniently treated in two categories: (1) those involving voyages to enemy ports, (2) those involving voyages to neutral ports. Under the first heading the single important case is that of the *Wilhelmina.*

(1) The *Wilhelmina,* an American merchantman, left New York for Hamburg on January 22, 1915, with a cargo of foodstuffs. On February 11, she was arrested at Falmouth, England, into which port she had entered of her own accord two

[28] *Note* of Sir Edward Grey to Ambassador Page, February 10, 1915, in *A. J. I. L., S. S.,* (1915), p. 80. The Report that accompanies the Declaration of London justifies the provision of Article 33 by which destination "for the use of . . . a government department of the enemy State" is declared sufficient to render conditional contraband liable to capture: "The State is one, though it necessarily acts through different departments. If a Civil Department may freely receive foodstuffs or money, the Department is not the only gainer, but the entire State, including its military administration, gains also, since the general resources of the State are thereby increased". See Bentwich, N., *The Declaration of London* (London, 1911), p. 70.

[29] *Times,* London, August 6, 1914, p. 6; August 11, 1914, p. 3.

[30] Bentwich, *A. J. I. L.,* 9, January, 1915, p. 42.

days earlier. The owners of the cargo refused to consent to its being discharged, hence the ship, which otherwise would have been released, was detained. It was at first desired to make a test case of the situation, but this was prevented by the British Order in Council of March 11, 1915.[31] The British contentions as explained by Sir Edward Grey on February 19, 1915, were (1) that the German decree of January 25, above noted, created a situation such that a cargo of foodstuffs consigned to Germany was in reality consigned to the German Government and (2) that the cargo was en route to a fortified place.

The second contention seems clearly a subterfuge. The first one is important. At first glance it appears to overturn the principle at the base of the distinction between absolute and conditional contraband. But further study leads to the realization that the British contention simply takes account of changed conditions, this transformation consisting in the fact that government control of all foodstuffs in time of war, coupled with rapidity of communication, renders it impossible to say what imports will get to the army and what will go to civilians. And if that point could be determined, there is the further fact that the obtaining of imports of food by the civilian population simply releases more of the domestic supply for military use.[32]

The case of the *Wilhelmina* was settled through diplomatic channels. The British Government purchased the cargo, paying the profit that the claimants would have received had their cargo reached its intended market, and adding an indemnity for the delay caused to the ship, so far as the authorities were responsible for it.

(2) Of the cases of neutral vessels captured en route to neutral ports, the twenty-five cases decided in the British Prize Court concurrently on September 16, 1915, serve as examples of the attitude taken toward conditional contraband by the British Prize Court.[33]

The cases arose in respect of some 32,312,000 pounds of lard

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[31] See *postea*, p. 144.

[32] This contention carried to a conclusion suggests that foodstuffs will be made absolute contraband by international agreement unless contraband is abolished.

[33] *Judicial Decisions*, British Prize Court, in *A. J. I. L.*, 9, (October, 1915), pp. 979–1005.

and meat products, a portion of the total cargoes, amounting to about 73,237,000 pounds, and including wheat, rubber, hides, oil stocks, lard, meat products, etc., contained in four neutral vessels. The vessels were thus described:

Alfred Nobel, Norwegian, Sailed Oct. 20, 1914—Captured Nov. 5, 1914
B. Bjornson, Norwegian, Sailed Oct. 27, 1914—Captured Nov. 11, 1914
Fridland, Swedish, Sailed Oct. 28, 1914—Captured Nov. 10, 1914
Kim Norwegian, Sailed Nov. 11, 1914—Captured Nov. 28, 1914

In each case the intended voyage was from New York to Copenhagen.

The Court, in dealing with the conditional contraband for which claims had been set up, noted first the enormously increased imports of foodstuffs to Copenhagen since the beginning of the war; e. g.,

"the average annual quantity of lard imported into Denmark during the three years 1911 to 1913 from all sources was 1,459,000 pounds. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 pounds. . . . the imports of lard from the United States . . . to Scandinavia . . . during the months of October and November, 1914, amounted to 50,647,849 pounds as compared with 854,856 pounds for the same months in 1913 . . . In the five months, August to December, 1913 the exports of lard from the United States of America to Germany were 68,664,975 pounds. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 pounds".

The issues which concerned the cargoes of the first three ships were decided in accordance with the generally accepted rules of international law, the Order in Council of August 20, 1914, having been repealed by that of October 29, 1914, issued after those vessels had sailed. The latter Order was applied to the cases which involved the cargo of the *Kim*.

Deciding first the nature of the cargoes of foodstuffs, the Court found that "all the foodstuffs were suitable for the use of troops in the field."

The second point decided depended upon the doctrine of continuous voyage, a doctrine "familiar to international law." The Declaration of London was criticised for its compromise upon the application of the doctrine: "As is usual in compromises, there seems to be an absence of logical reason for the ex-

clusion [of conditional contraband from the application of the doctrine]." The court said with great reason:

"If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy government or its armed forces?"

Pronouncing the doctrine of continuous voyage a part of the law of nations, the Court held that

"the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real *bona fide* place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination".

The third and final point concerned the question of ultimate destination; whether that was intended to be the German Government and its troops, or the civilian population. The onus of proof was held to lie upon the owners. The Court held that the "probable ultimate destination in fact of the cargoes" was "the German Government and their forces, for naval and military use," dwelling upon the note of Sir Edward Grey mentioned above and quoting the German case of *The Maria*.[34]

The Court allowed the claims in eight cases, and disallowed them in the remainder. The claims allowed were those in which an actual Danish destination was proved.

The central point in all these cases as in the case of the *Wilhelmina* is the application of the theory by which conditional contraband en route to enemy territory is made confiscable as being actually intended for the government and military forces of the enemy. The theory is again rested upon the German decree of January, 1915, and is made possible of application by casting the burden of proof upon the claimants. The control of the German Government over all German purveyors of food-

[34] See *postea*, p. 162.

stuffs makes the argument one difficult to combat and demands of international law that it take account of the new conditions.

In the majority of the cases which had been decided prior to the American note of December 26, 1914, the grievance of which the American Government complained was not the British classification of contraband but the prolonged delays caused by the policy of bringing vessels into British ports for search. These delays further aggravated the situation brought about by detention of neutral vessels on suspicion that the shipments had a belligerent destination. The American note pointed out that

"the effect upon trade in these articles between neutral nations resulting from interrupted voyages and detained cargoes is not entirely cured by reimbursements of the owners for the damages, which they have suffered, after investigation has failed to establish an enemy destination. The injury is to American commerce with neutral countries as a whole through the hazard of the enterprise and the repeated diversion of goods from established markets".[35]

The allegations of the reply of Sir Edward Grey, already alluded to, afford some support for the British practice in detaining neutral cargoes.[36] It will be sufficient here to note that the difficulties which arise under modern conditions in the application of the right of search had been discussed before the war and that certain proposals had been made looking toward some system by which officials of the neutral or belligerent government might certify to the contents of the cargo, thus placing the entire risk upon the owners of contraband. Sir Edward Grey expressed a wish that an "arrangement by which mistakes can be avoided"[37] might be found, but tentative efforts made by the United States Customs officials met with failure.[38]

4. The Control of Enemy Trade

The above title appears appropriate to this section in which it is proposed to discuss the situation created by the British

[35] Note of Secretary of State Bryan to Ambassador Page, in *A. J. I. L., S. S.*, (1915), pp. 55–60.

[36] Reply of Sir Edward Grey, *Ibid.*, pp. 60–65.

[37] *Ibid.*, p. 65.

[38] Garner, J. W., "International Law in the European War" in *A. J. I. L.*, 9, (April, 1915), p. 381 and notes 17, 18.

Order in Council of the 11th of March, 1915. Two distinctions must be pointed out, the first substantive, the second procedural.[39] The first distinction is that between the situations existent before and after March 15, 1915; the second distinction, that between the situation after March 15 and that which would have been created had the Order of March 11 provided for the traditional commercial blockade.

The first distinction is readily understood; whereas before the Order of March 11 neutral vessels had been free to enter German and adjacent neutral ports, subject to the regulations against contraband, after that Order went into effect all merchant vessels which had sailed after March 1, 1915, for German ports were required, unless they were given passes enabling them to proceed to a named neutral or allied port, to discharge their cargoes in a British or allied port, to be dealt with by the British Prize Court. The same rule was to apply to all merchant vessels sailing from German ports. And all merchant vessels which had sailed since March 1 from neutral ports for other than German ports, carrying goods either of enemy origin, or to an enemy destination, or which were enemy property, might be required to discharge such goods in a British or allied port. That is, after March 15, 1915, no neutral merchant vessel might enter any German port; no neutral merchant vessel might enter any other than German ports if she was carrying enemy goods of any description.[40]

The second distinction was one of procedure. In order to relieve neutrals from the consequences of the blockade, captured ships and their cargoes not contraband were not to be confiscated but were to be restored, if not requisitioned for the use of His Majesty. That is, a complete blockade was declared against German ports; but this blockade was moderated to the extent that neutral ships and their innocent cargoes were not to be con-

[39] For text of this Order see *A. J. I. L., S. S.*, (1915), pp. 109–112.

[40] A special arrangement was made by which cotton shipments which complied with certain requirements were "allowed free (or bought at contract price if stopped)" up to the 31st or the 16th of March, according to circumstances. The claims of American shippers under this arrangement appear to have been adequately protected by the British Prize Court. See *Note* of Ambassador Page to Secretary of State *ad interim*, June 22, 1915, in *A. J. I. L., S. S.*, (1915), pp. 142–143.

fiscated; while a partial blockade, a blockade against all enemy goods, with the same moderation in the penalties, was declared in respect to neutral ports on European waters, including the Mediterranean.

The procedure which was provided for cases in which neutral ships were taken carrying enemy goods *from* an enemy or neutral port differed from that provided for cases in which neutral vessels were taken carrying enemy goods *to* an enemy or neutral port in that in the former class of cases goods might be sold as well as detained, while in the latter, provision was made only for restoration to the claimant or for requisition. However, if in the former class of cases it could be shown that the goods had become neutral property before the issue of the Order, the owner might take steps to have the proceeds of the sale paid to him.

By this Order Great Britain completed the structure of her system for the control of the trade of Germany, basing her action upon the right of retaliation for the submarine practice inaugurated by Germany on February 18, 1915. We have already pointed out the effects of the British extension of the contraband list so as to include even foodstuffs; of the application of the doctrine of continuous voyage to both classes of contraband; of the creation of new presumptions as to destination of conditional contraband; and of the thorough execution of the right of visit and search. With the Order of March 11, 1915, the climax was reached by the interdiction of all commerce between neutral states and Germany.

On March 30, 1915, the Government of the United States made certain observations upon the Order, which may be summarized as:

(1) The Order denies, with small qualification, the sovereign rights of neutrals, by creating new exceptions to those rights based upon the existence of a state of war.

(2) The belligerent has not the right to forbid the carriage of *innocent* goods to its enemies via neutral ports, even though the enemy's ports be blockaded. To assert the contrary is to deny that free ships make free goods, as laid down in the Declaration of Paris.

(3) A blockade of neutral ports cannot be in conformity with the established rules of war; therefore if the cordon blockading

German ports be extended across the entrances to neutral ports free admission and exit must be accorded to *all lawful traffic* with those ports through the blockading cordon. Unlawful traffic could be discovered, as before, by visit and search.

(4) As Scandinavian and Danish ports are open to trade with German Baltic ports, a British blockade is likely to operate with unequal severity upon neutral countries.[41]

In one paragraph only does the Secretary of State appear to strike a note inconsistent with the general tone of the communication. In that paragraph

> "the United States takes it for granted that the approach of American merchantmen to neutral ports situated upon the long line of coast affected by the Order in Council will not be interfered with when it is known that they do not carry goods which are contraband of war or goods destined to or proceeding from ports within the belligerent territory affected."

Apparently this suggestion was made with the object of restricting as far as possible the interference with neutral ships while not admitting the legality of the proposed British measures.

The firmness with which the second rule of the Declaration of Paris is upheld, together with the willingness manifested to take a sane view of military necessities in the modern application of blockade, renders this note remarkable.

The note of the British Government dated June 22, 1915, explains that in deference to the interests of American importers goods of enemy origin had been allowed, by various extensions, and in special circumstances, to leave neutral ports for the United States, and that, if express conditions were complied with, new cases might be considered through diplomatic channels.[42]

On July 15, 1915, the State Department instructed Ambassador Page to protest to the British Foreign Office in regard to the case of the *Neches*. This ship, the note stated, of American registry, had been seized while proceeding from Rotterdam for the United States and had been ordered to discharge cargo, the

[41] *Note* of Secretary of State Bryan to Ambassador Page in *A. J. I. L., S. S.*, (1915), pp. 116–122.

[42] Ambassador Page to Secretary of State *ad interim*, in *A. J. I. L., S. S.*, (1915), pp. 141–146.

property of American citizens, which had originated in Belgium, enemy-occupied territory. The Department reiterated its position as to the invalidity of the practice of Great Britain in attempting to prevent a neutral from trading with another neutral, or with a belligerent where contraband was not involved.[43]

On July 24, 1915, Sir Edward Grey set forth the argument in justification of the Order in Council of March 11, 1915. His main points were:

(1) The British blockade was simply an adaptation of old principles to a new situation.

(2) The American contention that trade through neutral ports (in non-contraband goods) with belligerents must not be interfered with was unsustainable in law or equity. "His Majesty's Government are unable to admit that a belligerent violates any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances render such an application of the principles of blockade the only means of making it effective."

(3) During the Civil War the Federal Government applied the doctrine of continuous voyage to commerce between neutral countries and neutral territory neighboring the territory of its opponent, in order to prevent the export of cotton and the import of contraband by the Confederate Government.

(4) Great Britain was "interfering with no goods with which [she] would not be entitled to interfere by blockade if the geographical position and the conditions of Germany at present were such that her commerce passed through her own ports."

(5) The War had so increased the opportunities for American commerce as to have compensated for the loss of the German and Austrian markets.[44]

The striking fact regarding this note is that it sustained the British Order in Council of March 11, 1915, upon alleged legal grounds. According to Sir Edward Grey a belligerent has the

[43] Secretary of State to Ambassador Page, *Ibid.*, pp. 154–155. On July 31, 1915, the Foreign Secretary replied to the American note, sustaining the legality of the seizure but agreeing to consider special circumstances if such consideration were to the interest of neutrals.

[44] Ambassador Page to the Secretary of State, in *A. J. I. L., S. S.*, (1915), pp. 157–161.

right under modern conditions to render effectual the blockade of his enemy's ports by subjecting the commerce of adjacent neutral ports to supervision. Great Britain was not blockading neutral ports since neutral countries were being allowed to import what they could prove was for their own consumption. British naval vessels were acting as had Federal naval vessels in the American Civil War, seizing enemy goods en route to neutral ports but actually destined to enemy territory then under blockade. The difference in British and Federal practice was not, he contended, one of principle but of extent of operation and degree of effectiveness.

Sir Edward Grey's argument is unimpeachable in its statement of the consequences of the geographical position of Germany with relation to certain neutral ports. A blockade of German ports while Rotterdam and Copenhagen remained open to German commerce would have been a farce.

The legal problem is less simple of resolution. Great Britain has the unquestioned right to blockade the ports of Germany. She has the right, based upon American precedents, to apply the doctrine of continuous transport in order to prevent evasion of her blockade. Blockade means the prohibition of all trade, not simply of contraband trade. In the case of the *Springbok* there is doubt as to whether the decision turned at all upon the question of contraband.[45] The United States therefore is in a peculiarly embarrassing position from which to criticise the British system for control of trade. She herself is mainly responsible for the development of the doctrine of continuous voyage.

We must not, of course, overlook the fact that American courts have never applied the doctrine to non-contraband or conditional contraband goods consigned to a neutral port but destined to reach hostile territory by transportation *overland*. The case of the *Peterhoff*, discussed on pages 67–68 *infra* proves this point incontrovertibly. They have gone no further than the dictum of the *Springbok* case, which declared that any sort of goods were confiscable if destined to a blockaded port, whether they were to pass through an intermediate neutral port or not.

[45] See pp. 66–67 *infra*, for discussion *Springbok* case.

Without question Chief Justice Chase was speaking only of transportation entirely by sea. And the trend of opinion since that time is recorded in Article 19 of the Declaration of London which provides: "Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port." In a concluding chapter it will be useful to inquire whether this Article or the present British practice is the more reasonable development in view of the character of modern warfare.

It might not unreasonably be asked why, when Great Britain had already adopted the practice of regarding foodstuffs as absolute contraband, it was necessary for her to enforce a policy by which the continuous transport principle could be applied to *all* German goods. The answer is that, recognizing the relationship between German trade and German military strength, Great Britain has undertaken to destroy German trade. So long as Germany could export valuable cargoes of dyestuffs and other articles to the United States she could create credits there against which she could draw in payment for the means of carrying on the war. Further, Great Britain hopes to depress German trade to the point where the depression will be felt by the whole nation. That her policy is assisting to destroy the credit of Germany is indicated by the fall in exchange value of the mark.[46]

An observation was made in Chapter I of this study to the effect that Great Britain's present plan for the control of enemy trade could be compared to the system she designed with a similar object in the struggles with France a century earlier. The two systems are alike in that they both may be regarded as attempts to control all commerce with the enemy. In the years of the Berlin and Milan Decrees and of the retaliatory Orders in Council it was lawful to capture enemy goods in neutral ships. Moreover, on account of transportation difficulties, neutral ports were of small value to a belligerent. So that it is probable that Great Britain would not have made use of the

[46] New York *Times*, July 19, 1916, p. 12. On July 19, 1916, four German marks were worth only 72.87½ cents whereas their value in ordinary times is 95.28 cents.

doctrine of continuous transport (which had already been evolved for colonial commerce) at that period, even had there been any neutral ports of importance upon which to practice it.[47] But today rapid communications bring Scandinavian and Dutch ports within a few hours journey of German markets. At the same time the Declaration of Paris intervenes to prevent arrest of non-contraband cargoes in neutral vessels and the result is a new system built about the nucleus afforded by the doctrine of continuous voyage.

The encouraging element of the present British system finds expression in the fourth paragraph of Sir Edward Grey's note to the State Department, accompanying the Order in Council of March 11, 1915:

"His Majesty's Government have felt most reluctant at the moment of initiating a policy of blockade to exact from neutral ships all the penalties attaching to a breach of blockade. In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral sea-borne commerce, they declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargoes which belligerents have always claimed in respect of breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory".[48]

This provision deprives the Order of much of its severity, in appearance at least. To Great Britain the power of requisition is preserved, while the neutral shipowner and the neutral and enemy cargo-owners lose only their accustomed markets. To the second rule of the Declaration of Paris, practically abrogated by the doctrine of continuous voyage, the above-named provision restores a portion of its effectiveness. The encouraging feature of this relaxation of the traditional consequences of breach of blockade is the evidence it affords that belligerents have felt the necessity for compensating neutrals even when they regarded their measures of restriction as justifiable developments to meet new conditions.

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[47] She did not attempt to enforce such a rule over commerce entering Swedish ports.

[48] *A. J. I. L., S. S.*, (1915), p. 110. This, of course, leaves to Great Britain the right to confiscate contraband and vessels whose cargoes are mainly contraband, since this right exists independently of blockade.

B. German Practice in the European War

Germany, in common with the other belligerent countries during the present war, has, in theory, observed the Declaration of Paris. That body of rules has, without proclamation, been regarded as binding upon all nations and may be considered as definitely a part of international law. After the failure of her opponents to agree to reciprocal action in placing the entire Declaration of London in force Germany took no further action in that direction.

The beginning of the war saw the frequent hypothesis of British and continental publicists realized in fact. England and Germany were opponents in maritime warfare. England had the advantages of alliance with other maritime powers of considerable strength and of the assistance of those powers in preventing importation through other territory into Germany. Nevertheless the opportunity was afforded to test the value of the arguments which those who feared the effects, direct and indirect, of attacks by German cruisers upon British commerce had adduced in support of the contention that England's interests would be better served by the abolition of the right of capture than by its retention.

The navy of Germany was second only to that of Great Britain. British commerce in 1913 totalled nearly a billion and a half sterling.[49] To undermine England's fighting capacity by striking at her commerce was to Germany a desideratum second only to the destruction of the British navy. The German "system" (if one may use that term in this connection) for the crippling or destruction of British foreign trade, if it does not present the steady development in design and effectiveness noted in the British measures, is not less interesting or less novel.

1. The Contraband Lists and Continuous Voyage

The first lists of contraband published by the German Government were those constituting Articles 22 and 24 of the Declaration of London and incorporated in the German Prize Ordi-

[49] *Statesman's Year Book*, 1914, p. 73.

nance printed in Reichsgesetzblatt, 1914, No. 4.[50] On October 22, 1914, the State Department at Washington was informed that copper and lead had been added to the German list of conditional contraband.[51] On November 19 "all rough or unworked lumber" was also added, with the exception of certain woods not likely to be used as fuel.[52] On November 23 the list of conditional contraband was further extended by the addition of woods of all kinds, rough or worked, cylinder tar, sulphur, and sulphuric acid.[53] Nickel and aluminum were added on December 14, 1914.[54]

On April 18, 1915, was published Reichsgesetzblatt No. 49, declared to be "in retaliation of the regulations adopted by England and her allies," which provided for certain amendments of the German Prize Ordinance of September 30, 1909, and placed the amended Ordinance in force. The new lists contained twenty-two denominations of absolute, and twenty-one of conditional contraband. To the articles under the former heading listed in the Declaration of London were added rangefinders, field glasses and nautical instruments, lead, barbed wire and implements therefor, tinplate, submarine sound signaling apparatus, aircraft of all kinds, lathes, mining lumber, coal and coke, and flax. The articles added as conditional contraband were: wool and woolen yarns, rubber tires for motor vehicles, rubber and gutta percha, sulphur, sulphuric acid, nitric acid, various ores and metals, antimony, various ferro-alloys, leather suitable for military purposes, tanning materials, and lumber other than that made absolute contraband.[55] Thus, although these lists were composed after those of the British Order of March 11, 1915, such important articles as wool, leather, nickel, and copper, which appeared as absolute contraband on the British lists, were left as conditional contraband in the German categories. On the other hand articles especially important to the military operations of Germany's enemies, such as coal and coke and ma-

[50] Ambassador Gerard to the Secretary of State, in *A. J. I. L., S. S.*, (1915), pp. 37–38.
[51] *Ibid.*, pp. 38–39.
[52] *Ibid.*, p. 39.
[53] *Ibid.*, p. 39.
[54] *Ibid.*, p. 42.
[55] *Ibid.*, pp. 43–46.

chinery for the manufacture of munitions of war, appeared on the German list of absolute contraband and not upon the British. These obvious facts evidence one of the difficulties in the way of establishing universally acceptable contraband lists. What one country needs another country has. And they add point, also, to the situation previously recognized, in which the organization of the entirety of a state's resources for war enables a belligerent readily to find reason for transferring an article from one category to another.

Article 33 of the German Ordinance set up the same presumptions of destination to the government or military forces of the enemy as had been established previously for the British prize court.

Article 35 provided that "articles of conditional contraband are liable to seizure only on a vessel en route to territory belonging to or occupied by the enemy, or to the armed forces of the enemy, and when such vessel is not intended to unload these articles in an intermediate neutral port". This provision, which applies the rule of the Declaration of London exempting conditional contraband from capture under the doctrine of continuous voyage, was modified to the extent that if "the goods are consigned to order, or the ship's papers do not show who is the consignee, or the goods are consigned to a person in territory belonging to or occupied by the enemy", or "if the vessel is bound for a neutral country with regard to which it is shown that the enemy government draws articles of the kind in question from that country", the provision was not to apply.[56]

Thus, whereas the British Government had ordered the application of the doctrine of continuous voyage to conditional contraband and had later moderated that order so that it should apply only to situations "where it [was] shown to the satisfaction of one of his Majesty's Principal Secretaries of State that the enemy Government [was] drawing supplies for its armed forces from or through a neutral country", the German Government provided for the general application of the rule of the 35th article of the Declaration of London and then created such exceptions to the application as to bring into effect the same regula-

[56] *A. J. I. L., S. S.*, (1915), pp. 43–46.

tions as Great Britain had developed, previous to her blockade order of March 11, 1915.

2. The Destruction of Shipping

The cardinal feature of the German system for the control of enemy foreign trade during the present war has been the practice of destroying merchant vessels, both neutral and enemy, at sea.

For the destruction of merchant ships to have the warrant of legality, conditions of undoubted military necessity must exist. These conditions are variously interpreted in different countries, but are universally recognized. There appears to be some tendency to consider that two degrees of necessity may exist, one for the destruction of enemy, the other of neutral vessels. But any distinction of this sort must be purely artificial, since the term "necessity" has by nature no other connotation with respect to the sinking of neutral than of enemy vessels. The opinion of many publicists that the destruction of neutral ships is always illegal has not received the support of judicial decisions.

For a belligerent whose home and colonial ports are blockaded and who is faced with the present tendency unfavorable to reception of prizes in neutral ports, the practice of destroying prizes appears to have replaced that of bringing them in. Although compensation must be paid for the unlawful destruction of neutral vessels and non-contraband goods, enemy or neutral, on board, the lengthened lists of contraband and the rule that renders the neutral carrier of a particular proportion of contraband subject to confiscation decrease the liabilities that may arise from a policy of indiscriminate destruction.

The definite requirement of visit and search constitutes a condition to be satisfied before destruction which may not be neglected even in the presence of the direst military necessity. This requirement remains in spite of the fact that its execution has increased in difficulty with the increased dimensions of steamships. The fact that it is of greater importance as applied to neutral ships does not alter the absolute character of the rule in all cases. And it is not entirely one-sided in effect, since it

operates in the belligerent's favor by providing a sanction against the use of neutral flags by enemy vessels.

Although enemy vessels have not the same legal protection against destruction as restrains belligerent conduct toward neutral vessels, the observance or non-observance of the rule of military necessity, which applies to enemy as well as to neutral ships, has its bearing upon the question of immunity. As was pointed out in the discussion of the Russo-Japanese War[57] a belligerent conducting naval operations in an area far from his home or his colonial ports is unlikely to hesitate at interpreting the doctrine of military necessity in the sense most favorable to himself. The poorly-defined distinction in international law between the circumstances which justify the destruction of enemy vessels and of neutral vessels tends to draw upon the latter the fate of the former.

It is essential to a clear judgment upon the question of destruction that the conflict between the legal rights of a neutral to transmit his goods in enemy bottoms and to transmit enemy goods in his bottoms and the legal rights of a belligerent to destroy enemy ships and neutral ships be kept in mind. It is the same conflict involved in capture, the difference being one not of principle but of degree of injury to the innocent owners, since, where destruction takes place, compensation is not obligatory in all cases in which confiscation would not result from capture, and the payment of compensation is less likely to approximate the injury which the owners have suffered than is the return of the goods with damages.

The problem involved in the practice of destruction is more acute as touching neutral vessels because of their immunity from capture *per se* and of the necessity that the belligerent establish a guilty connection on their part with the enemy before he may consider whether circumstances of military necessity exist to justify destruction. Furthermore, while the destruction of enemy vessels is illegal, except in more or less definitely recognized circumstances, there is lacking the effective sanction against such destruction which is present in the obligation to compensate for illegally destroying a neutral vessel and in the

[57] See *infra*, p. 42 ff.

resentment of neutral nations where neutral vessels are concerned.[58]

The problem in this portion of our study is twofold, and each side of the problem has its corollary. The four questions to be answered are:

(1) Has Germany observed the rules of law which concern the destruction of enemy merchant ships?

(2) Has Germany observed the rules which concern the destruction of neutral merchant ships?

(3) Has the submarine proved its capacity for effective action as a legal means for the destruction of enemy merchant ships?

(4) Has the submarine proved its capacity for effective action as a legal means for the destruction of neutral merchant ships?

If the answers found for these questions take proper account of the facts, they should determine whether the German practice in the present war has advanced or retarded the progress of immunity and they should point toward a desirable method for dealing with the problem of destruction in modern maritime warfare.[59]

Although isolated instances of the destruction of enemy merchant vessels had occurred during the first months of the war, it was not until February 4, 1915 that Germany announced her "system" for cutting off British commerce.[60] That system was outlined as follows:

"The waters around Great Britain, including the whole of the English Channel, are declared hereby to be included within the zone of

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[58] This resentment is of course present with regard to the destruction of enemy vessels where neutral lives are endangered, but this point has a more direct bearing upon particular methods of destruction than upon destruction itself. And the resentment aroused in neutral owners of cargo upon destroyed enemy vessels lacks the sanction afforded by the requirement of compensation.

[59] The indiscriminate use of submarine mines, though at first more essentially a part of the German than of the British system was very soon made a barrier to the passage of ships across the North Sea by England's War Zone Order of November 3, 1914; see ed., *A. J. I. L.*, 9, April. 1915, p. 463. This practice is patently a lawless procedure, and of doubtful influence in comparison with the other methods which the present war has developed. At best mines can only form an auxiliary means of warfare.

[60] Up to the end of 1914, 162 steam and sailing vessels of all nations had been destroyed by mines and war vessels. *Hazell's Annual* (1916), p. 279.

war, and after the 18th instant all enemy merchant vessels encountered in these waters will be destroyed, even if it may not be possible always to save their crews and passengers.

"Within this war zone neutral vessels are exposed to danger since, in view of the misuse of neutral flags ordered by the Government of Great Britain on the 31st ultimo and of the hazards of naval warfare, a neutral vessel cannot always be prevented from suffering from the attacks intended for enemy ships".[61]

This proclamation, which not only assumed the existence of military necessity justifying the destruction of all enemy merchant vessels met within the waters surrounding Great Britain but threatened neutral vessels with the same treatment, was declared by the German Government to be a form of "retaliation" against the measures taken by England in violation of international law, to stop all neutral sea commerce with Germany.[62] Thus, at the beginning of her submarine campaign Germany virtually admitted the illegality of her methods.

The State Department on February 10, 1915, protested against the German decree on the ground that in the absence of blockade a belligerent had no right to proceed against a neutral ship except after visit and search.[63]

On February 16, the German Foreign Office replied with a more elaborate exposition of the alleged illegal measures which Great Britain had taken to cut off Germany's food supplies. The particular grievance was the treatment of foodstuffs as absolute contraband. The German note carried the clear inference that the United States had been willing to submit to illegal treatment of their trade with Germany by the Entente powers, though it did not charge a technical departure from neutrality. It pointed out "very particularly and with the greatest emphasis, that a trade in arms exists between American manufacturers and Germany's enemies which is estimated at many hundred million marks". This second argument illustrates the retaliatory nature of Germany's action, since the German Government

[61] *Proclamation* in *A. J. I. L., S. S.*, (1915), pp. 83–84. Translation as quoted in editorial, *A. J. I. L.*, 9, (April, 1915), p. 465.

[62] "Memorial of the Imperial German Government", in *A. J. I. L., S. S.*, (1915), pp. 84–85.

[63] The Secretary of State to Ambassador Gerard, in *A. J. I. L., S. S.*, (1915), pp. 86–88.

"rely on the neutrals who have hitherto tacitly or under protest submitted to the consequences, detrimental to themselves, of England's war of famine to display not less tolerance toward Germany, even if the German measures constitute new forms of maritime war, as has hitherto been the case with the English measures".

Two paragraphs of this note appear inconsistent with one another. In one "the presumption will prevail, even in the case of neutral ships, that they have contraband on board, in view of the interpretation of the idea of contraband in which the English Government have indulged as regards Germany and which the German Government will accordingly apply against England". In the other "naturally the Imperial Government are not willing to waive the right to establish the presence of contraband in the cargoes of neutral ships and, in cases requiring it, to take any action necessary on the grounds established".[64] The former of these statements would lead to the supposition that neutral vessels would be sunk on sight, the latter appears to recognize the necessity for visit and search.

The German Government also pointed out that the British Admiralty was encouraging the use of neutral flags by British merchant vessels, and added that the armament of a merchant ship was the chief obstacle preventing the practice of visit and search. This acknowledgment of the difficulty of using the submarine in accordance with the known rules of warfare was emphasized in the reply of the German Foreign Office on March 1, 1915 to the American proposal of February 20, regarding a *modus vivendi* for the belligerents.[65] The German note ad-

[64] For text of note see *A. J. I. L., S. S.,* (1915), pp. 90–96.

[65] The Government of the United States proposed that both Germany and Great Britain agree: (1) not to sow any floating mines nor to plant any anchored mines on the high seas except within cannon range of harbors, for defensive purposes only; (2) not to use submarines against any merchant ships except "to enforce the right of visit and search" and (3) to forbid the use of neutral flags by their respective merchant vessels "for the purpose of *disguise or ruse de guerre*". It was further proposed that Germany should permit the establishment of American agencies in Germany for the distribution of foodstuffs to the civilian population through licensed German retailers. To Great Britain it was proposed that she do not place foodstuffs on the contraband list nor interfere with their shipment to the American agencies in Germany. See text of note in *A. J. I. L., S. S.,* (1915),

mitted the willingness of the government to restrict the use of submarines, but this restriction was to be

"contingent on the fact that enemy mercantile (*sic*) abstain from the use of the neutral flag and other neutral distinctive marks. It would appear to be a matter of course that such mercantile also abstain from arming themselves and from all resistance by force, since such procedure contrary to international law would render impossible any action of the submarines in accordance with international law".[66]

The failure of the American proposal was followed by the initiation of the German measures for the "blockade" of the United Kingdom. As already noted the destruction of enemy merchant vessels by torpedoes fired from submarines had begun before February 18, 1915, but until January 30 of that year only one enemy merchantman carrying non-combatant passengers, the French *Amiral-Ganteaume*, had been sunk without warning and visit.[67] On the latter date two British merchant vessels, the *Taku Maru* and the *Icaria* were sunk in the North Sea without visit and without provision having been made for the safety of the crews, whereas two others, the *Linda-Blanche* and the *Ben-Cruachan* were sunk in the Irish Sea after their papers had been examined and time had been allowed the crews to take to the boats.[68]

With the expiration of the fortnight's delay granted by the German proclamation of February 4, 1915, the number of enemy vessels reported sunk increased and neutral vessels also were destroyed. On April 9, 1915 the London *Times* announced that thirty-three British merchantmen had been sunk between the dates of February 18, 1915 and April 7, 1915, an average of about five per week. An appreciable number of merchantmen flying the Dutch, Danish, Swedish, and Norwegian flags were

pp. 97–99. Germany refused to give up entirely the use of mines for offensive purposes or to desist from submarine attacks on commerce except under the conditions noted above. Great Britain therefore declined to discontinue her restrictive measures against the food supply of Germany. For British reply see *A. J. I. L., S. S.,* (1915), pp. 106–109.

[66] *A. J. I. L., S. S*, (1915), p. 100.

[67] See article by Perrinjaquet, J., "La guerre européene et le commerce des belligérants et des neutres" in *R. G. D I. P.*, 22, (1915), p. 177.

[68] *Ibid.*, pp. 177–178.

sunk during the same period.[69] The causes of the destruction of the American vessels *Carib* and *Evelyn* during the first week of the new submarine warfare were doubtful.[70]

The earlier cases of destruction of enemy merchantmen which induced the most vehement neutral protests were those of the *Falaba* and the *Lusitania,* the former sunk on March 28, 1915, the latter on May 7, 1915. As the present discussion is not concerned with the question of the safety of non-combatants at sea, these cases are of interest only for the facts as to the existence of necessity for sinking and as to the observation of the rule of law which requires visit and taking off of papers. The first question is concerned with destruction as such, the second with the submarine as an agency for destruction.

With regard to the first question, the circumstances of the present war appear to justify the conclusion that, viewed as a question apart from others involved with it, military necessity did exist in the cases above-mentioned and would be likely to exist in the majority of cases in which German warships of any type were concerned with merchantmen.

Without open home ports except those on the Baltic Sea, without open colonial ports, and with the omnipresent menace of recapture and its consequences, there is in fact no course open to a German warship except destruction or release of its prizes.

The second question is to be as readily resolved *against* the German Government. As the right of visit and search has its justification in the necessity, in the case of enemy vessels, of discovering the evidence as to the ownership of vessel and cargo which is contained in the ship's papers, so the right to destroy may be exercised only after this evidence has been secured. It may not be true, as is declared in the American note of May 13, 1915, that "it is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers

[69] Professor Garner states that "down to June 12, the number of Norwegian vessels that had been destroyed by mines and submarines was reported as twenty-nine, the aggregate value of which was estimated at $7,500,000, the number of Swedish vessels twenty-four and the number of Danish vessels, fourteen", "International Law in the European War," VII, *A. J. I. L.,* 9, (July, 1915), pp. 610–611.

[70] Perrinjaquet, J., *R. G. D. I. P.,* 22, (1915), pp. 205–207.

and cargo",[71] i. e., it may not be a physical impossibility, but it has been submitted and appears to be a well-grounded opinion that the same circumstances that render it suicidal for ordinary German war vessels to appear on the seas, viz., the superiority of the Allied fleets, makes the carrying out of visit and search by submarines inexpedient to the point of impracticability.[72] The problem then resolves itself into the question of whether the submarine shall be regarded as entitled to disregard the regulations which the rules of warfare have established for warships as a class. The introduction of such factors as the use of neutral flags by enemy merchant vessels and their armament for defense is intended to cloud the real issue. The warship as such must cope with these recognized agencies for increasing the security of private property at sea. The submarine, since it carries on the operations of a warship, must submit to its limitations.

At present it is impossible to discuss adequately the position taken by the German Prize Court with reference to neutral property on board destroyed enemy vessels. It would appear from some of the early decisions that the court would follow the French precedent noted in the case of the destruction of the *Ludwig* and the *Vorwärts*.[73] The Court of Prize at Hamburg, refusing to compensate Norwegian owners of goods destroyed in connection with the sinking of a British vessel, said:

"Germany is in no way obliged to indemnify neutrals for losses experienced in such circumstances. The commander of a submarine has not time to inquire into the value of the neutral goods which may be sunk with the torpedoed ship. If he had time, how could he estimate whether the indemnities eventually to be granted for such goods would exceed the advantages to Germany of the destruction of a British vessel?"[74]

The inference to be drawn from this decision is that the submarine commander should be relieved of any compunctions by the knowledge that his country will not have to pay compensa-

[71] The Secretary of State to Gerard in *A. J. I. L., S. S.*, (1915), p. 131.

[72] It has been suggested to the writer that it may not be the difficulties of visit and search alone which now limit German submarine activity, but the impossibility of acting profitably on the facts ascertained.

[73] See Chapter II, p. 37.

[74] Perrinjaquet in *R. G. D. I. P.*, 22, (1915), pp. 208–209, and n. 2, p. 208.

tion to neutrals, whose property may be destroyed on enemy ships. A preferable standard is that which assures the commanders of commerce destroyers that their services are of far more importance to their country than the value of the neutral goods destroyed and that their government will deduce from the rule of freedom for neutral property in enemy ships the corollary of obligatory compensation for the necessary destruction of such property.[75]

At the same time that neutral governments were protesting against German treatment of the property of their citizens in enemy ships, they were concerned to an even greater degree in protests against similar treatment of the ships of their own citizens and of their cargoes. Not all of these cases arose in consequence of the German declaration of a "war zone". The German Government declared with reference to the destruction of the Dutch merchant ships, *Medea, Batavier* and *Zanstroon,* that they were engaged in carrying contraband of war.[76] Sir Samuel Evans, President of the British Prize Court, took occasion in his opinion in the Chicago Meat Packers' Cases to cite the decision of the Hamburg Prize Court in the case of the *Maria.* In this case the German court justified the destruction of a Dutch vessel carrying wheat to British merchants at Belfast on the ground that

> "there [was] no means of ascertaining with the least certainty what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British would not have come upon the scene as purchaser, even at a very high price, and in this connection it must also be borne in mind that the bills of lading were made out *to order* which greatly facilitated the free disposal of the cargo".[77]

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[75] The British practice which applies this standard has never been accompanied with a denial of the obligation of visit and search. The latter requirement is not only consistent with the more lenient treatment of neutral owners, but would appear to be necessary in order to establish the identity of neutral non-contraband goods since duplicate papers would be unreliable.

[76] Torpedoed in the North Sea in the latter part of March, 1915. See Perrinjaquet, *R. G. D. I. P.,* 22, (1915), pp. 206–207.

[77] *Cases* in *A. J. I. L.,* 9, (October, 1915), p. 1004. This decision was to have been expected after the developments in the *Wilhelmina* case. It would appear, however, to destroy the German contention against the British treatment of foodstuffs as absolute contraband.

The most interesting and important case of this character was that of the United States merchant ship *William P. Frye,* which was sunk on January 28, 1915, by the *Prinz Eitel Friedrich,* while engaged in carrying a cargo of wheat from Seattle, Washington to Queenstown, Falmouth or Plymouth for orders. The United States made no claim for the cargo, but its claim for the value of the ship plus damages was immediately admitted to be valid by the German Government.[78]

With the respective interpretations of the treaties of 1799 and 1828 between Prussia and the United States, which treaties Germany admitted to be in force, this study is not here concerned.[79] The points of interest here are (1) that Germany regarded the cargo of wheat as contraband; (2) that Germany held the destruction of a neutral vessel, the cargo of which was more than one-half contraband, to be justifiable when "the attempt to bring the American vessel into a German port would have greatly imperilled the German vessel in the given situation of the war.[80]

Into this case the question of the submarine as an instrument of destruction did not enter. The question of the right of destruction involved two questions of fact: (a) the existence or non-existence of circumstances of military necessity; (b) the presence or absence of a sufficient contraband cargo to justify the capture and confiscation of the ship. As to the latter question there was no controversy, so that we may regard the contraband character of the wheat as having been established. The answer to the first question must equally be in the affirmative, since the situation of a German warship on the high seas in the present war has always been precarious in the highest degree. The note of October 12, 1915, in which the State Department accepts, conditionally, the German *modus agendi* according to which Germany "[reserves] to itself the right to destroy vessels carrying absolute contraband wherever such destruction is per-

[78] See *correspondence* between Secretary of State Bryan and Ambassador Gerard, in *A. J. I. L., S. S*, (1915). pp. 180–182.

[79] See correspondence, *ibid.*, pp. 182–193.

[80] On July 10, 1915, the German Prize Court at Hamburg so decided, but it recognized that the Prussian-American treaties rendered the Imperial Government liable for indemnity. See *note* of Ambassador Gerard to Secretary of State, July 30, 1915, in *A. J. I. L., S. S.*, (1915), pp. 190–191.

missible according to the provisions of the Declaration of London,'' virtually concedes this:

"Without admitting that the Declaration of London is in force, and on the understanding that the requirement in Article 50 of the Declaration that 'before the vessel is destroyed all persons on board must be placed in safety' is not satisfied by merely giving them an opportunity to escape in life boats, the Government of the United States is willing, pending an arbitral reward in this [the Frye] case, to accept the Declaration of London as the rule governing the conduct of the German Government in relation to the treatment of American vessels carrying cargoes of absolute contraband".[81]

Other cases of the destruction of neutral merchant vessels of the United States will afford further basis for conclusions as to the effects of the European War upon the question with which we are now dealing. On May 1, 1915 the *Gulflight,* en route to Rouen from Port Arthur, Texas, was torpedoed. She afterwards managed to reach a British port. The submarine made no attempt to visit the ship before firing the torpedo. The German Government on June 1, 1915, explained the action as ''an accident'', due to the fact that the submarine commander had mistaken the *Gulflight* for an enemy vessel under convoy. ''The German Government [expressed] its regrets . . . concerning this incident and [declared] itself ready to furnish full recompense for the damage thereby sustained by American citizens''.[82] On May 25, 1915 the *Nebraskan,* bound from Liverpool to the United States in ballast, was damaged by a submarine's torpedo. The German Government on July 12, 1915, again pleaded a mistake in identity and agreed to pay full compensation.[83]

In neither of these cases was the neutral vessel destroyed, but in both the intent to destroy was admitted. In neither case was any attempt made to visit and search the vessel. The case of the *Nebraskan* appears an especially conclusive illustration of the length to which submarine warfare is liable to be carried. The ship was sailing west and the circumstances were favorable

[81] Ed., *A. J. I. L.,* 10, (April, 1916), p. 371.
[82] The German Minister for Foreign Affairs to Ambassador Gerard, in *A. J. I. L., S. S.,* (1915), p. 137.
[83] *World Peace Foundation Series,* V, 5, pt. 2, p. 190.

to visit and search. Yet the commander preferred to take the chance that the vessel was hostile in character and to disregard the requirement of visit.

Admitting, then, the existence of circumstances which would have justified destruction had the neutral vessel been engaged in any service which would render her liable to capture and confiscation, the failure of the commanders of the submarines to determine whether or not that essential condition was fulfilled invalidates their action.

It seems clear that the practice of indiscriminate destruction of merchant ships has reached important dimensions because of the recognition of the same fact that has led Great Britain to develop her system for the control of trade, that fact being the vital importance of foreign commerce. Both systems in their operation would repudiate the right of enemy property to be respected in neutral ships and both systems do repudiate that right up to the point where neutral endurance ceases and the probability of effective neutral resentment becomes a certainty. The recognition of the vital interest of a nation in maintaining its commercial relations is as old as maritime warfare. The captains of the Confederate cruisers spared neutral merchantmen only through fear of the consequences if they acted otherwise. Today, with the merging of the commercial identity of the individual into that of the state in time of war, with the drawing together of the opposite corners of a country by new means of communication and transportation, and with the increased industrial and commercial activity of nations, the interest of a belligerent government in stifling the foreign commerce of its enemy renders of secondary importance the profit which it may derive from the capture of enemy property.[84] It is for this reason that the question of immunity is so complex. It must be considered not only separately but also in its relation to the comprehensive problem of control of trade. This

[84] This statement may be considered extravagant. In May, 1916, in a note addressed to a friend of the writer, Professor A. H. Charteris said: "It seems too early yet to say whether it pays to capture (and destroy); to capture and incorporate in one's own service is always an advantage". But the statement in the text refers to the success of a policy of destruction in seriously interfering with or annihilating an enemy's trade.

has been evidenced by the frequency with which new methods for interfering with the enemy's commerce have been adopted in order to replace older methods which either have been legally forbidden or have become obsolete in the presence of new conditions.

These new devices and methods, usually developments of older measures or outgrowths from their basic principles, point toward an increasing determination on the part of belligerents to regard commerce as an object of attack, not only legitimate but of the first consequence to the enemy. The tendency appears to be toward a view of an enemy nation's commerce as a whole, upon which an important portion of its war strength depends, and away from the older principle of separation into portions differing in ownership, character, and destination. The profit to be derived from considering as a separate question the abolition of capture in the narrow, accepted sense has become extremely doubtful.

It is in the light of this new concept of the importance of a nation's commerce that belligerent practice has been analyzed up to this point and that conclusions upon the questions which have been submitted as epitomizing the issues raised by the German "system" for the destruction of trade with the enemy may be ventured. Germany has had since the beginning of the war the justification for destruction which the existence of real military exigencies affords. This has been true as regards both enemy and neutral vessels. On the other hand, her usual practice has been in disregard of the requirement of visit and search before destruction; i. e., as regards the rule the application of which she could control, her practice has been inconsistent and has tended toward repudiation of the rule.

This accusation holds only as it applies to her submarine warfare. Her cruisers have followed the generally accepted regulations of maritime warfare. This distinction in fact may point to a distinction in principle. The handicap under which the submarine operates has many elements which need not now be recited. The most important of these elements, the impossibility of taking any appreciable number of passengers on board, lies outside the province of this essay. It is submitted, how-

ever, that, having regard only to those phases of the question which have been discussed, the submarine has not justified itself as a legal agency for the destruction of commerce, that it is even less suited to the business of capture, and that its use has weakened the case for destruction.

The "systems" for the control of trade which Great Britain and Germany have developed may be taken as the systems of the Allies and the Central Powers respectively. And it is probably true that the broad lines of these opposing "systems" had been laid down by July, 1915. It has seemed advisable not to carry the discussion of practice beyond that date. The present war has followed out the tendencies observed in previous wars, toward the creation of methods for the evasion of the prohibitions which had been established in international law for the partial protection of private property at sea. Great Britain and Germany both have extended the contraband list to a degree heretofore unknown. Great Britain is supplementing her blockade of German ports by a rigid supervision of the traffic of neutral ports. Germany has attempted to frighten commerce off the seas by showing herself ready to sacrifice legal safeguards recklessly. Great Britain has abused the right of visit and search by detaining ships and cargoes, thereby causing annoyance and loss to neutrals. Germany has failed to use the right where its use was demanded.

The rights of private property owners in the present war have been rendered entirely illusory. It has already been pointed out that the nature of the war is such as to make the control of the enemy's trade of high importance to a belligerent. That being true it inevitably followed that innocent private property would be placed under restrictions and deprived of the free movement that the laws of nations, formulated amidst other conditions, were intended to ensure.

The situation is not altogether discouraging. The belligerents have recognized that, in order to be permitted to violate the spirit of the rules which embody the progress so far attained, they must be ready to introduce such moderations of their practice as will substantially compensate neutrals. In some instances they have gone beyond what neutrals could law-

fully demand in regard to a particular measure, in order to ensure their acquiescence in other measures, the legality of which neutrals might impugn. Above all considerations of minor importance the belligerents have placed the idea of destroying the commerce of their enemies as an entity. In consequence the facility with which certain of the various means of interference with commerce may be extended and expanded to take the place of other means has been emphasized. The vast scale of maritime operations as they have been and are being carried on in the present war has provided the data necessary to a useful conclusion upon the trend of practice since the Declaration of Paris.

[26] BRITISH PRESUMPTIONS OF HOSTILE DISTINCTION

By the *Order in Council* of August 20, 1914 in *A. J. I. L., S. S.*, (1915), pp. 4–5, Great Britain placed in force Article 34 of the Declaration of London, according to which the destination of conditional contraband to the use of the armed forces or of a government department of the enemy state was to be presumed to exist "if the goods are consigned to enemy authorities, or to a contractor established in the enemy country, who as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy". The same presumption was to arise "if the goods are consigned to or for an agent of the enemy State, or to or for a merchant or other person under the control of the authorities of the enemy State". In the Order of October 29, 1914, the last mentioned presumption was curtailed by the loss of the final clause, while conditional contraband on board a vessel bound for a neutral port was to be presumed destined to the enemy forces or government if the goods were consigned "to order, or if the ship's papers [did] not show who was the consignee of the goods, or if they [showed] a consignee of the goods in territory belonging to or occupied by the enemy". This Order placed the burden of proof of innocent destination in the last-mentioned cases upon the owners of the goods. (*Order in Council*, No. 614 in *A. J. I. L., S. S.*, 1915, pp. 14–15.) Alongside these additions to the number of presumptions operating against the defendants was placed article 5 of the Order of August 20, 1914, by which the same rules were to apply to conditional as to absolute contraband proceeding toward a neutral port. The rigidity of this regulation was somewhat relaxed by the second article of the Order of October 29, 1914; thereafter only when it should be "shown to the satisfaction of one of His Majesty's principal Secretaries of State that the enemy Government [was] drawing supplies for its armed forces from or through such neutral countries",

would the 35th article of the Declaration of London be applicable. By this provision Great Britain hoped to secure and did secure the co-operation of neutral governments adjacent to the territories of her enemies for the prevention of transshipment to such territories and the preservation of their own commerce. Italy, the Netherlands, Denmark, Sweden, and Norway placed an embargo upon the exportation of many absolute and conditional contraband articles to enemy territory. In order to assure Great Britain of the *bona fide* character of these embargoes certain neutral countries permitted the organization of systems by which imports could be consigned to named persons or firms whose guarantee that the goods would not be re-exported would be accepted. The Netherlands Overseas Trust is, perhaps, the most prominent of these agencies. Such a plan, before the Order of March 11, though essential to unhindered commerce, was optional with the neutral countries adjacent to Germany. After that Order the increased liability of their carriers to capture acted as a more absolute sanction of the organization of commercial agencies which would mean assurance to Great Britain of the effectual operation of her system for control of trade.

CHAPTER VI

THE PRESENT STATUS OF THE QUESTION

The history of the development of the law of maritime capture is a record of progress. Throughout the series of overlapping changes from the time of indiscriminate capture, changes which brought successively into operation the rules of hostile infection, of the *Consolato del Mare,* of free ships, free goods, and finally of the Declaration of Paris of 1856, the movement has been continuously in the direction of relieving neutral property owners from the strictures imposed upon them by maritime war.

"Malgré les interruptions et les reculs temporaires dans toutes ces différentes réformes du droit de prise, on ne saurait méconnaître le fil rouge qui les parcourt toutes: c' est une tendance, avançant en dépit des obstacles et des efforts de résistance, à exempter la vie privée de l'influence de la guerre."[1]

Nevertheless the failure to comprehend or the reluctance to accept the plain conclusions to be drawn from history tends to obscure the elements which at any given time enter into the question of immunity for private property in war at sea. It is easy to regard the establishment of partial limitations upon the right of capture as evidence of a movement toward complete freedom of private property. This is especially encouraged by the existence of the principle of immunity in land warfare. The advocates of inviolability for the ships and cargoes of maritime entrepreneurs proceed from the argument that war at sea should be assimilated in this respect to war on land to the assertion that the developments which have been recorded constitute not only the beginnings of that assimilation but its practical realization in principle.

[1] Kleen, *Lois et usages,* II, p. 675.

Whether or not immunity for private enemy property rests upon any fundamental postulate of international law will be considered hereafter. It is submitted that whatever may be the status of the principle of immunity in warfare on land, in war at sea the rule of capture remains, subject to important limitations in the interest of neutrals and to relatively minor exceptions of certain forms of private enemy property. Neither of these classifications of restriction may be viewed as altering the question of principle. The latter is based upon special considerations of humanity or desire for the advancement of science and art and does not raise the principal question. The former has reached legal standing not through the influence of a theory of protection for private rights *per se* but through the continuous pressure of forces differently combined at different periods, among which theoretical dialectic is not to be overlooked, for the recognition of the rights of neutrals. At no period has there been a general acceptance among nations of the desirability of exempting enemy ships and enemy goods from the operation of the law of prize.

Immunity and neutral rights are entirely different questions when viewed from the standpoint of theory. The defence of inviolability for all private property at sea so far exceeds in difficulty that of exemption of neutral property as to preclude the drawing of any conclusions regarding the former from the establishment of the latter. But greater than the influence of theory has been the power of neutral governments to enforce observance of rights which they have at different periods considered to be rightfully theirs. The latest step taken by belligerents in acknowledgment of such rights is one which permits the transportation in neutral vessels, without fear of confiscation, of non-contraband cargoes owned by belligerents. The Dutch origin of this, the free ships, free goods principle; the record of its maintenance by the Armed Neutralities; and finally the voluntary incorporation of the principle by Great Britain in her rules for the conduct of maritime operations in the Crimean War, render it impossible to regard this final advance as anything but a concession to neutrals.

The establishment of complete inviolability as a principle of

maritime warfare remains, therefore, an ideal. The two avenues of approach to an adequate understanding of the present tendencies toward or away from a realization of the ideal in practice are (1) the appreciation of practice under the legal limitations on capture that now exist, and (2) the estimation of the present status of the movement for immunity.

Dealing first with the observance of the existing law of capture, attention is necessarily centered upon the second and third rules of the Declaration of Paris. The latter of the two rules, which provides for freedom from confiscation for neutral goods on enemy vessels, may be the more briefly considered.

In placing his goods on board an enemy ship a neutral must anticipate the possibility of the capture of the ship and consequent loss of time and profit. Lengthened contraband lists, a feature of modern practice which will be considered immediately affect such ventures as well as those upon neutral ships. The most serious though not peculiar liability which neutral cargoes undergo upon enemy vessels is one which follows upon the continuance of the ancient practice of destruction. While Great Britain maintains the rule of compensation for neutral property destroyed with enemy merchant vessels, the usual determination of other states has been in the contrary sense. Such decisions are based upon the law of military necessity and pay no heed to the logical alternative of compensation when neutral property, granted immunity from capture by the Declaration of Paris, has been destroyed. Bentwich, however, goes further than is justified by the facts regarding the destruction of enemy ships conveying neutral goods, when he foresees the general destruction of enemy vessels should they be rendered legally free from capture. It is more probable that if the ships themselves were not regarded as contraband the practice would follow that now put in operation against neutral ships—which may be destroyed only upon justifiable suspicion of certain illegalities.

The increased importance of submarine warfare has emphasized the tendency to act upon assumptions of military necessity. Simultaneously, the legal execution of a policy of destruction of captures has been proved to be a doubtful possibility, even if

the existence of military necessity be granted. The requirement of visit before destruction of an enemy vessel is one that holds especial difficulties for the submarine, even when the merchant ship is not armed. These difficulties have been increased by the varying practice of submarine commanders in the matter of visit, which has rendered the captains of merchant ships uncertain as to their probable fate and consequently willing to attack a submarine as a measure of defence.

The element of time required for visit and search is more important when the ship visited is neutral and the need arises to ascertain whether or not there is proof on board to justify her destruction. If it is necessary today to conduct a vessel into port for search, the circumstances that render capture impossible will operate with the same effect to render impossible the legal destruction of neutral vessels. If it is possible to search a ship at sea, the time required will increase the danger to the submarine from hostile cruisers.

What the development of the submarine may be cannot be foreseen. Whether it becomes more or becomes less vulnerable, more or less rapid in submerging, larger or smaller, the requirement of visit and search cannot be ignored as long as it remains a rule of international law. To ignore definite legal requirements because such requirements were incorporated into the law without anticipation of a particular means or instrument of warfare, or because they would prevent the most effective use of new equipment for war would be to divert international law from its present trend toward increased definiteness, and increased limitation upon belligerent action harmful to neutrals. The purpose of international law in taking account of new circumstances and new devices to evade old rules, if it is, in part, to maintain the advantages and disadvantages of opposing belligerents, is mainly to prevent retrogression from standards attained.

The attitude of belligerents toward the second rule of 1856, by which enemy property in neutral ships is made immune from capture has been partially dealt with in the preceding paragraph. Since the Russo-Japanese War, destruction at sea has become a menace to neutral as well as to enemy ships and their

cargoes. Other means of evasion of the rule—the actual observance or non-observance of which forms the crux of the question as to the value of the existing regulation of the right of capture—are plentiful. Realizing this, while granting that the letter of the law has been observed strictly, the conclusion that is forced upon the student of recent practice is that, through the unwarranted extension of belligerent rights based upon related portions of the law of maritime warfare, the rule that private enemy property is free when transported in neutral ships very nearly approaches nullity, and is only preserved in some semblance of vigor by the influence of neutral opposition to the devices of belligerents for rendering it a "dead letter". Whether or not the ultimate realization of immunity waits upon the success in practice of the second rule of the Declaration of Paris may be an open question. Arguments have been quoted to the effect that that rule must be abrogated and either complete immunity substituted or the *Consolato* rule revived. It would seem, however, that unless the rule of safety for enemy goods in neutral ships be respected there is small hope for respect of a similar rule of safety for enemy ships and cargoes.

As has been suggested in an earlier chapter the device most readily available for evasion of the legal inviolability of neutral cargoes on board enemy merchantmen is the extension of the list of contraband. This device is particularly dangerous because the arguments upon which it rests are plausible and, to a considerable extent, well founded. It cannot be denied that scientific advance has resulted and is continuously resulting in the application of new articles to the manufacture of equipment and supplies for war. The temptation to emphasize the possible warlike use of a commodity of commerce has been irresistible. But of more far-reaching effect has become the practical revival of the medieval doctrine of the relations between the individual citizens and the governments of opposing belligerent countries. This has been brought about by the same development of scientific methods in the field of organization for and administration of the totality of the state's resources in time of war, a development which has enabled belligerent governments to destroy the

effectiveness of the double classification of contraband. That these phenomena are not mushroom growths of the latest war has been shown by examples of previous practice. The present war demonstrates the growing importance of this phase of the problem since the progress of the struggle has been marked by new additions to the contraband list and new regulations to render the proof of the innocence of a particular cargo more difficult. Of chief importance in the category of articles transferred from the list of conditional to that of absolute contraband are foodstuffs. The futility of exempting enemy property from capture and immediately or at convenience making the chief necessities of life absolute contraband is obvious. The present war has demonstrated in a striking way the inter-relationship of the questions of contraband and immunity for private property at sea. In view of the attitudes of the Powers toward the former question at the Second Hague Conference, an agreement to abolish contraband by the Third Conference may be regarded as among the possibilities.

The transfer, in the Russo-Japanese War, of numerous articles previously rated as conditional contraband to the list of absolute contraband should have been a warning to the delegates at the London Naval Conference that the compromise there formulated, which admitted the application of the doctrine of continuous voyage to absolute but forbade it with regard to conditional contraband, would be ineffective. In the present war, however, the continuous voyage principle has been applied to both categories of contraband, since from its beginning the attitude adopted toward national organization for war has been such as virtually to destroy the distinction between them.

Sustained by the authority of British Prize Court decisions, the opinions upon this point handed down by the United States Supreme Court at the time of the Civil War have an excellent prospect of becoming universally accepted in practice, provided, of course, that contraband is retained. The logic of the situation cannot be evaded and neutral protests have exhibited a realization of that fact.

The right of visit and search has been transformed in practice. There appears to be a considerable weight of authority

for the contention that the modern steamship cannot be thoroughly searched at sea. The protests of neutrals directed at detention upon suspicion are therefore likely to be without adequate basis if the suspicion has arisen after visit has been made. While the right of capture persists belligerents must be expected to make it effective if possible, and neutrals should anticipate an expansion of embarrassing restrictions to correspond with their enlarged facilities for evading capture or detection of guilt. They may demand, however, that the administration of admitted powers be accomplished *bona fide* and with the least possible delay. A probable line of advance lies toward an administrative arrangement by which the character and destination of cargoes may be vouched for officially. The analogy of such a practice with the acceptance of the certification of a public convoying vessel should assure its success as a principle and in practice.

The creation of new presumptions of the destination of conditional contraband to the armed forces of the enemy was foreshadowed in the Declaration of London. Even more onerous than the provisions of that instrument for transferring the burden of proof to the owner of the goods have been the regulations to that end proclaimed during the present war. Articles of conditional contraband have thus found obstacles hitherto unknown to their entrance into enemy territory.

Blockade, applied in accordance with the rules which have received universal acceptance, destroys all unlicensed communication with enemy ports within the scope of its operation, and has always constituted a recognized limitation upon neutral freedom of action. The war zone which was declared by Germany in February, 1915, has been called a submarine blockade with destruction as the penalty for attempted breach, but it has lacked the first essential of a blockade, effectiveness. The absence of that essential element was inevitable in circumstances where capture was impossible and the carrying out of visit and search impracticable. The so-called submarine blockade, like the war zones maintained by the use of mines, depends for effectiveness not upon capacity lawfully to prevent access to and

exit from ports in a blockaded area but upon the incitement of the fear of summary destruction in the owners and captains of merchant vessels. They are both "paper blockades", resort to which by belligerents is additional evidence of the importance attached to the ability to control the enemy's commerce.

The British or Allies' system, developed with the same motive of control, has likewise reached its climax in the application of blockade. The effectiveness of this blockade, except before the Baltic ports of Germany, is unquestioned. It has been lawfully carried out and has even been attended with a degree of moderation of the accepted rules of blockade, since the penalty of confiscation has not been imposed for attempted breach of blockade, and enemy property not contraband captured under a neutral flag has suffered no harder a fate than requisition.

But this unwonted moderation of a lawful blockade has been the sop offered to and so far accepted by neutrals for acquiescence in the supplementary "control" which the Allied navies have exercised over the commerce of neutral countries adjacent to or near enemy countries. By a supervision as rigid as that consequent upon the blockade of German ports, trading with the stipulated ports, in goods destined for or coming from enemy persons, has been prevented. Where it has been attempted and discovered the same consequences have followed as though the neutral port of destination were blockaded, except for the substitution of requisition for confiscation already noted. Goods which have succeeded in running the gauntlet of presumptions of hostile destination and have thereby proved their final destination to be neutral have been permitted to pass.

This situation brings into opposition the right of a belligerent to blockade an enemy's ports and the right of a neutral to transport non-contraband goods having their origin or ultimate destination in enemy territory, to or from ports not blockaded. Since not all commerce with the specified neutral ports is interdicted, the Allies' system is to be regarded simply as a comprehensive and thoroughly executed plan of capture carried out close to the ports of neutral countries situated near hostile territory. It leaves open the way for cargoes destined to be consumed by neutrals and it affords compensation, payable at the

end of the war, to the owners of innocent enemy or neutral property requisitioned from neutral ships.

If this, the crowning feature of the practice of the Allies, is considered apart from its relation to the blockade of German ports, it must be admitted that the second rule of the Declaration of Paris "[has followed] the Declaration of London into the sphere of ancient history and the neutral flag no longer 'covers' enemy property".[2] Though that rule must be read subject to the condition that a belligerent may requisition according to his needs, the present situation exhibits the intention of stopping all enemy trade. The general recognition of the Declaration of Paris makes the execution of that intention illegal.

If, however, the control exercised over the trade of certain neutral ports be regarded as supplementing the blockade, the same difficulty is experienced in meeting the logic of geography that was met with in discussing the application of the continuous voyage principle to contraband. In both cases the rule of intended destination has been substituted for that of avowed destination, and the substitution, either in view of the changed conditions of transportation or of the inherent logic of the development, has a considerable justification in fact and law.

It may be submitted that the points of attack for neutrals who wish to render effectual the rights of their merchants and shippers are the laws of contraband and blockade. So long as the former permit a belligerent to cut off an indefinite volume of trade with the ports of his enemy, and the latter permit the interdiction of all such trade, the rule of continuous voyage must be admitted to be the natural corollary of both. It is difficult to recognize the justice of the principles of contraband and blockade without recognizing that the principle of continuous voyage is also just. The Declaration of Paris has been disregarded, but the continuous voyage doctrine has been only the means used to prevent older belligerent rights from being reduced to absurdities and to maintain the advantages which maritime supremacy has hitherto been held to entail.

[2] Baty, T., "Naval Warfare: Law and License" in *A. J. I. L.*, 10, (January, 1916), p. 52.

Briefly to summarize the preceding conclusions: the letter of the laws of limitation upon capture has been followed but the laws have not been effective in practice. Contraband, blockade, continuous voyage, presumptions of hostile destination, visit and search, destruction, all of them admittedly established rights, have been extended arbitrarily so that it is impossible to contend that the Declaration of Paris has been observed. The degree of observance that it has been accorded has varied with the differing necessities of opposing belligerents. Continuously the sense of the importance of destroying the enemy's commerce has increased and alongside this development there has been revived the concept of control of all commerce which may result in assistance to the enemy, a concept which has lacked an adequate field of application since the great wars of the French Revolution and the Empire. In the present war the sanctions of destruction, and of capture with resultant sequestration or requisition, have formed the cardinal elements of the "systems" for control of trade placed in operation by the Central and the Allied Powers respectively. Both of these systems by virtue of their common objective contemplate, and, so far as they are effective, accomplish, the overthrow of rules of international law which have been developed after centuries of effort by combining the several means of trade restriction to which a belligerent may have recourse. It is not within the province of this study to discuss the changes which will be necessary in order that the laws which provide for the inviolability of the neutral flag may become effectual. That changes are necessary and that the movement for the immunity of all private property from capture at sea cannot be expected to raise the super-structure of legal limitation until the foundations shall have been strengthened are the inevitable conclusions to be drawn from the last half-century of practice.

Our conclusions upon the tendencies observable in the modern practice of the law of capture may be supplemented by other conclusions as to the present importance of the question of immunity, both as a general issue, debated by the theorists of all countries, and as a political problem, presenting different phases according as the circumstances of states vary.

The partisans of immunity regarded as a general principle have most frequently taken as the starting-point of their arguments the proposition that war is to be viewed as giving rise to a legal relationship of states which concerns individuals only indirectly; they point out that the existence of this relationship is already recognized in land warfare, and that logic demands the recognition that what is right and just in one must be applied in all other fields of warfare if conduct is to conform to the standard demanded by modern civilization. This thesis has always been disputed by the majority of English writers and is losing ground on the continent in consequence of the increasing tendency to admit that an actual conflict of interests exists between a belligerent state and individual citizens of an opposing state. In the words of Dupuis: "ce qui amène la soumission du vaincu, ce n'est pas le désastre militaire, ce sont les conséquences de ce désastre, c'est-à-dire les entraves que le vainqueur est en mesure d'imposer a l'activité du pays, désormais incapable de défendre la liberté de ses échanges, de ses transactions, de sa vie".[3] The Rousseauan theory upon the basis of which immunity from the evils of war has been demanded and justified for non-participants in military operations has assuredly never gained public recognition as a legal principle and it appears to be losing rather than gaining the support of theorists.[4]

It is possible, however, to grant the soundness of the theory and still to demonstrate the futility of any attempts to apply it in principle to operations against commerce. Are the great mercantile corporations of the belligerent states, both those which purchase and produce and those which transport, to be looked upon as merely passive participants in a war in which their country is engaged? In importing the necessities of life, to which commerce in time of war reduces itself, are they not as

[3] *Le droit de la guerre maritime*, p. 61.

[4] Dupuis maintains the theory that capture rests upon a legal principle, as being the sanction of the interdiction of the use of the seas, "seule façon de remplacer sur la mer où la possession et la souveraineté sont impossibles, ce qui est, dans la guerre continentale, l'occupation du territoire". See *Le droit de la guerre maritime*, p. 64 and n. 1. Peillon contradicts this sentiment: "on ne parle plus du droit d'interdire la mer à ses ennemis. . . . Car la guerre, aujourd'hui, est un moyen de se faire rendre justice". *La propriété privée ennemie*, p. 55.

active participants as are those who work the guns? Do they not furnish the means of subsistence? Would not the efforts of actual fighting men be impossible if they could not be fed and clothed? And will not a country's fighting capacity be increased in proportion as it can use its men for actual military operations, leaving to transporters and importers the providing of the necessary supplies? How is it possible to regard the business of maritime commerce as aught else than the indirect but nevertheless active participation in war of the citizens of the belligerent states? Kleen would support his argument to the contrary by pointing out that the real nature of capture is piratical. "L'objet", he says, "n'en devient pas plus belliqueux parce qu'il augmente—ainsi que la fait toute chose quelconque possédée par la nation—le capital national et partant la capacité de la nation de supporter les fardeaux de la guerre."[5] But it would be quite illogical and impossible to urge that private goods should not be interfered with simply because they do not come within the traditional and obvious category of contraband. Granted that goods are enemy property being carried in the ships of the enemy; that no neutral national can be injured by their capture (if such a situation can be imagined under present conditions); the opposing naval forces are concerned only with preventing necessaries from reaching their destination. Upon them the individual of the enemy nation has no legal or moral claim, so long as he can be regarded as assisting their opponents.[6]

Nor has that enemy individual any prerogative, as Vidari seems to suppose, which would permit him to determine the amount of his property and effort, his *activité propre*, that he may expend for the common good. War demands the entire effort of a state and increases proportionately the liabilities of each citizen to maintain the public interest. Conversely it relieves the enemy state of the necessity of observing the rules of peaceful relationship since it is impossible to estimate to what extent the other state may demand the assistance of its citizens. Applying the principle of the "police power", which is simply

[5] Kleen, II, p. 690.
[6] Bluntschli, *Droit international codifié*, p. 35.

the power of government carried to its ultimate conclusion for the preservation of the life or safety of its citizens, the state may authorize the destruction of property without recompense. War creates a greater justification for the exercise of this right than does any imaginable situation of a time of peace. Westlake writes:

> "On principle we must say that the capture at sea of enemy property as such is a military measure, an operation of war, and that its defence is therefore independent of the mediaeval doctrine of the solidarity of sovereigns and states with their subjects . . . Its justification must lie in its effect on the fortunes of a war".[1]

Wherefore the attempt to overthrow capture as a right must rest on the comparative ineffectiveness of that means of warfare rather than upon any supposedly legal relationship which should render private individuals immune from direct injury. But if it be granted that military measures must conform to legal principles and that war is a relation simply between states, the above brief analysis of the relation of the state to the individuals within it appears to demonstrate the futility of attempting to apply the doctrine of Rousseau to the problem of rendering war more humane.

Fortunately that problem does not depend for its solution upon theories of the juridical nature of war. Whether war is *bellum omnium contra omnes* or not it is by nature cruel and inhumane and for that reason entails *naturally* an effort to lessen its stringencies, an effort which may be expected to gain strength in proportion as it is recognized to be consistent with the interests of belligerents and of neutrals.

The moral or humanitarian argument for immunity may be pressed too far. Capture is only relatively, not absolutely, inhumane. The increased practice of destruction has, indeed, altered the aspect of capture and encouraged attempts of prospective prizes at escape, attempts which usually have ended in disaster to the merchant ships. Where the presumption is that the capture will be lawfully executed there is small likelihood that

[1] *International Law*, II, p. 130.

the intended prize will try to escape, since the penalties for such an attempt are so severe.

The moral gain derived from the right of capture is to be balanced against the injury which it causes to private undertakings. The interest of neutral as well as hostile merchants and shipowners in urging the prevention or termination of wars has continuously increased as commerce has expanded and as maritime operations have been to a greater extent directed toward the annihilation of all enemy trade. And the prospect of the privations that are certain to result for all classes and, in a great war, in all countries, forms the basis of a restraining influence that should not be overlooked. It appears difficult to argue that capture is a useless weapon, in the face of the vehement protests, heard in the present war, against the stoppage of supplies. It is irrelevant to argue that to support capture on moral grounds is to demand that war be made as frightful as possible, since one may maintain the utility of a practice while refusing to countenance inhumane procedure in its operation.

The factor controlling the attitude of states will continue to be the effectiveness of capture, as a military method supplementing other means of naval warfare. The determination of this question is difficult because of the multitude and variety of its phases. The value of ships and cargoes condemned must be considered together with the injury caused by imposing an enforced idleness upon great numbers of merchant ships, and by preventing an enemy from bringing his prizes into port, thereby leaving to him the unprofitable alternatives of release or destruction. By causing a dearth of vessels suitable for transports the right of capture may operate to safeguard the captor against invasion. It may prove a means of defence by ridding the seas of ships intended to be used as auxiliary cruisers, by forestalling the transfer of sailors to warships, and by preventing the training of further reserves. The several historical instances of the failure of a belligerent to attain final victory after destroying the commerce of an adversary have been cited as proof that capture is not a decisive instrument of warfare. That argument fails to take account of the importance of capture to the victor. Capture, like other means of belligerent action, must be judged

as one part of a composite scheme, to be retained or discarded according as it is a necessary or unnecessary feature of the combination. And the importance of capture cannot be determined in a general formula, since it depends for each particular war upon the degree to which maritime operations are important.

Our study of the supplementary limitations which belligerents have placed upon commerce in time of war is sufficient proof that capture has lost a portion of its effectiveness in consequence of the development of means of communication and the increased rights of neutrals. Without the application of these supplementary measures capture would be useless as a means of shutting off the supplies of continental states but would retain its usefulness in driving hostile shipping from the seas, thereby increasing the cost of carriage and decreasing the facilities of the enemy for invasion by sea. Directed against an island power, capture without blockade is apt to be quite as effective as is capture combined with the blockade of a continental power, since in the former situation there is lacking the possibility of importation across land frontiers.

The military aspect of capture determines its political importance and the several factors of that aspect present different problems to states in different circumstances. These factors will be discussed separately as they affect the interests of different states, in order that the comparative significance of the problems which arise may be understood.

It may be prefaced that to neutral states the abolition of capture, *ceteris paribus,* is a matter of indifference. It is unlikely that, as Hautefeuille held in 1868, they would be injured thereby since the need of transports and auxiliaries of other sorts would leave the demand for ships as carriers of commerce as strong as or stronger than in time of peace. On the other hand the same obstacles that have been observed as rendering of no effect the rights of neutrals in war at sea would still exist. The change would consist simply in the assimilation of private enemy ships and cargoes to the present status of neutral property on the high seas.

The considerations that have moved states in determining their attitudes toward capture are in the main the following:

(1) naval strength;
(2) the extent of foreign trade carried under the national flag;
(3) the sources of the national food supply;
(4) the relation of capture to other agencies for control of trade;
(5) the interests of neutrals.

(1) The arguments by which increases in naval expenditure have been obtained have always included that of the need of a navy sufficient to guarantee the continuance of foreign trade in time of war. Conversely the confidence inspired by a formidable fleet has at times either rendered states indifferent to immunity or led them to oppose new steps in that direction.

Great Britain today is the one Power in which such a feeling of confidence appears justified. To her the navy is the assurance of her continued existence. Her policy demands the capacity to dominate the seas against any probable combination of Powers. The realization of that result in war would bring as its natural corollary the power to control the enemy's trade while the securing of supremacy at sea by an adversary would mean the loss of the war. To Great Britain, therefore, the question of immunity appears chiefly a question subsidiary to the question of reduction of armaments. She will consider a decrease of her war equipment provided that other nations, to which other means of warfare such as armies of invasion are more important, will consent to moderate their military and naval programs.

The confidence of Great Britain in her naval supremacy must depend to some extent upon her consideration of probable allies and opponents. The history of her alliances of the last sixteen years shows that she now regards an "isolated" position as untenable. This consideration is of much greater importance to the maritime powers which may contemplate Great Britain as an opponent, so that any discussion of the individual attitudes of states must be submitted with the recognition that they are likely to be modified by the circumstances of an actual state of war.

On the other hand the alignment of friends and enemies in the present war is not to be regarded as a proper basis for general conclusions as to the advantages and disadvantages of capture for the separate states involved.

(2) If Great Britain is the only power which may count upon ultimate supremacy at sea in any probable war, other countries may regard capture, used as an offensive weapon for the destruction of British commerce, as of sufficient effectiveness to compel a considerable rise in freights and insurance and an appreciable transfer of British cargoes to the neutral flag. Germany, France, the United States, and Japan each possess the requisite naval strength to interrupt British commerce and cause appreciable loss before the seas could be cleared of their cruisers. The United States, with a small body of shipping to protect, might be able to maintain sufficient strength at sea to be a continuous menace to British commerce.

As navies and mercantile marines now stand, the balance of advantage would remain with Great Britain. This statement cannot at this time be substantiated if the destruction which German submarines have accomplished be regarded as a consequence of the existence of the right of capture. It seems not impossible that the submarine may drive Great Britain into the ranks of the exponents of immunity. However, considering only those means and methods of maritime warfare as are now admitted to be legitimate, the British Navy remains easily supreme. Excepting those of the United States, Great Britain is undoubtedly in a position to bottle up the ports of her possible opponents as she has in the present war, thereby rendering their fleets ineffective through forced inactivity or through destruction, and it is not inconceivable that in the end she could bring the same pressure to bear upon the United States. At the same time she can diffuse the isolated losses likely to result from new methods of attack directed against her widespread foreign trade and prevent the undue rise of insurance rates, as she has done in the present war, by a system of state insurance of ships and cargoes.[8] And since Parliament has made it a criminal offence to treat contracts of insurance upon the ships and cargoes of

[8] *The Times*, London, August 4, 1914, p. 2.

alien enemies as "debts of honor", British insurance companies will undergo losses due to the exercise of the right of capture upon the property of the enemy by British warships only when they have reinsured neutral companies which have taken risks on captured property.[9]

On the other hand the advantages which Great Britain's opponents might have drawn from the legal immunity of enemy goods under neutral flags have not been realized, but have been rendered illusory by methods which have been sufficiently discussed on previous pages. Thus, whereas the right of and limitations upon capture have been of no military value to the Central Powers, to Great Britain the right of capture has been the nucleus about which she has developed her system for the control of enemy trade, while evading the limitations upon that right.

(3) Alone among the great powers, with the possible exception of Japan, Great Britain depends for a sufficient food supply upon her ability to import by sea. To her, therefore, the right of capture presents, in this respect, a peculiar danger, a fact which she has used with good reason as an argument in justification of her claim that maritime supremacy should be hers of right. Because, however, of the protection afforded by her navy, the effects of the right of capture upon prices of food in Great Britain have hardly been important enough in the present war to affect the strategic situation. By keeping the seas open the Allies have been able to import foodstuffs almost at will, so that the continued high prices in France and the United Kingdom are to be credited largely to other factors than the liability of French and British vessels to capture.[10] At the same time, so strict has been the Allies' blockade of German and Austro-Hungarian ports, and their supervision of trade to ad-

[9] See for contrary views upon the question of the illegality of payments by British insurance companies to alien enemies a leading article in the *Manchester Guardian,* July 4, 1913, which deals with a statement of Sir Edward Beauchamp, chairman of Lloyd's, to the effect that "all such contracts will be faithfully carried out during war as in time of peace"; and an article by Bentwich, N., "Trading with the Enemy" in *A. J. I. L.* Vol. 9, 1915, pp. 352–372.

[10] Ed., "Trade in War Time" in *The Political Quarterly,* No. 7, March, 1916, pp. 99–121.

jacent neutral ports, that Germany was compelled early in 1915 to place under government control the distribution of the supply of grain and flour.

It is fair to assume the possibility of conditions in which, being confronted by a combination of maritime powers of greater strength, Great Britain would find the harassing of her commerce in food supplies much more inconvenient, in fact extremely dangerous. War with a country possessed of a large fleet and ordinarily the source of a large part of British supplies of grain and meat would present such a situation. It is obvious, however, that only by a blockade of her ports could Great Britain be starved into submission. So that, while the possible shortage of foodstuffs is for Great Britain the most serious element in the question of capture, it is more to be feared as an influence tending to excite panic, than as one likely to become an actuality of sufficient importance to compel the discontinuance of military operations.

(4) The relation of the question of capture to contraband, blockade, and continuous voyage was dwelt upon at the Second Hague Conference. The recognition of the results of practice during the previous fifty years prevented the delegates of certain powers, to which immunity was desirable in principle, from voting in favor of a proposal which they knew would be ineffective in practice. Boeck foresaw the difficulty when he wrote:

"il est inutile de faire entrer le principe de l'inviolabilité de la propriété privée ennemie à la mer dans le droit international positif, si les restrictions qu'apportent à ce principe la contrebande de guerre et le blocus doivent être démesurément aggravées par la théorie prospective de la continuité du voyage".[11]

The extended application of the concept of blockade, with its modern corollary, continuous voyage, presents special advantages to Great Britain as being the means whereby she can use her superior naval power to offset the advantages of overland importation which continental states enjoy. To Great Britain the right of capture would be reduced, if the application of the principles of blockade and continuous voyage were rendered im-

[11] Boeck, p. 695.

possible, to the less value which it has for France or Germany or the United States. On the other hand the abolition of contraband is favored in England, since that would assure to Great Britain supplies of food and munitions.

To continental states the abolishing of capture is a desideratum valuable in itself—since the presumption must be that the British navy will always be able to do a proportionately greater amount of injury through capture than will its opponents—but one more to be favored if blockade is simultaneously outlawed. To render shipping inviolable would be to perform a service of small value to Germany or France as long as a hostile blockade could be placed in operation not only before their own ports but virtually also before the ports of neighboring neutral countries.

The reluctance of Continental Powers to consent to the abolition of contraband is likely to diminish in view of the tendency to regard the destruction of prizes as the normal alternative to be adopted by a belligerent whose opponent has gained practical command of the sea. Under a régime of destruction the non-contraband character of neutral goods carried under the British flag is a matter of indifference to the captains of hostile commerce destroyers. Should any considerable bulk of British commerce come to be carried in foreign vessels, the possibility of profitable destruction would proportionately decrease, and with this the interest of Continental states in a contraband list that should contain foodstuffs and raw materials would again increase.

The contraposition of the major interest of Great Britain in the abolition of contraband and that of the Continental powers in the abolition of blockade appears to present the opportunity for a compromise which would render it possible to abolish capture with the reasonable expectation that such action would have practical effect. The outlook is the more encouraging in that the Second Hague Conference did not discuss the ways and means of meeting the difficulty which the continuance of contraband and blockade would place in the way of any attempts to render the abolition of capture effective.

(5) The history of the steps by which inviolability has been secured for certain classes of private property in war at sea

has always illustrated the conflict between belligerent and neutral interests. At no time since the Declaration of Paris, by which the neutral flag was permitted to cover any non-contraband cargo, have neutrals been able to render secure the validity of this safeguard. The sincerity with which they have upheld the law when neutrals has been belied by their actions when themselves at war. Even when, as neutrals, they have protested successfully against encroachments, they have not hesitated, when themselves belligerents, to extend the practice of the same or similar limitations upon neutrals.

The British argument at The Hague in 1907 presented the abolition of contraband as a measure that should be taken in the interest of neutrals. During the present war Great Britain has exhibited a willingness to preëmpt rather than to confiscate conditional contraband; similarly she has requisitioned enemy goods and released neutral goods captured while destined to blockaded ports. If it must be admitted that the belligerent who extends the contraband list and enforces the principle of continuous voyages is acting within his rights as interpreted under the necessities of modern warfare, these moderations of penalty are demanded in the interest of neutrals and are to be regarded as the logical corollaries of the expansion of the belligerent field of action, and it should be within the province of neutrals to assure their permanence.

The publicists of all countries urge consideration for neutrals, dwelling upon the economic interdependence of states and pointing out that the danger of making enemies of neutral powers increases directly with the amount of interference with their trade. Great Britain has found it expedient to compensate neutral owners for the destruction of their innocent cargo with enemy merchant vessels, a standard of procedure which no other country has yet adopted. In the light of practice, however, the conclusion is inevitable that belligerents unfailingly have subordinated neutral rights to their own interests. The situation of the Declaration of Paris today demonstrates that, in previous wars as well as in the present, neutrals have been inclined to acquiesce in the progressive degradation of their lawful rights.

The investigation of practice and the evaluation of recent tendencies toward or away from immunity for private property from capture at sea lead to the same conclusion. The record of practice has exhibited during the last half-century the tendency to treat enemy commerce as a unit; the abolition of privateering which removed the grossest form of private booty-getting has been followed in several states by the abolition of prize money but also, among the maritime Powers, by the extension of traditional belligerent rights; the devising of supplementary means for rendering the older rights effective; and the consolidation of old and new limitations upon commerce into what have been termed "systems" for the control of all trade which may contain possibilities of assistance to the enemy. "Control" rather than "destruction" is the object of such a system in its complete development, enabling the separation of enemy from neutral commerce, the requisition of enemy and the release of innocent neutral property. The willingness to apply a policy of indiscriminate destruction must be regarded as having been evoked by the necessity that knows no law. Such a policy, however, displays the realization of the importance of attacking enemy commerce in its entirety, of disregarding the value of individual prizes, and of hesitating at no measure calculated to assist toward strangling the enemy by economic pressure.

Partisans of immunity continue to discuss the question as one concerned only with capture. The weight of their argument is now being directed, however, toward demonstrating the impracticability of the right of capture, rather than its inconsistency with theoretical justice. This continued attack upon capture *per se* is justified, perhaps, as an attempt to obtain half the loaf where the whole is beyond the possibilities of the moment. It fails to convince because it takes as its starting point the Declaration of Paris—which has been effectually abrogated in practice—and because it fails to appreciate sufficiently the attitude which nations possessed of considerable maritime power have come to adopt toward enemy commerce.

Governments, if their own relation to the development of this attitude has been sometimes unconscious, realize that the attitude exists and interpret the question of capture with that fact

in view. It is true that to all states capture presents its own aspects of benefit and injury. It has seemed to the writer that Great Britain would be justified, on considerations of selfish interest, in desiring the practice contemplated by the Declaration of Paris; and that, conversely, states to which war with Great Britain is not an impossible consideration are consulting their own interests in favoring the abolition of capture. The most efficient navy must in the nature of things accomplish the greatest injury to enemy commerce. Capture, if the Declaration of Paris were observed, would become a less decisive factor but one that would be most effective in the hands of the navy which could most nearly interdict the use of the sea to its enemy's fleets of war.

The situation that exists demands, however, that governments so shape their polices as to ensure that whatever advance in principle is accomplished shall be made effective. Accordingly we find that the proposition of immunity has received within the last decade a wider interpretation in parliamentary discussion and international conferences. Henceforth it can hardly be considered except in relation to the various elements—blockade, contraband, continuous voyage, visit and search, war zones—that are capable of being incorporated with the basic element, capture, into "systems" for the "control" of enemy trade, systems designed with the object of disorganizing utterly the economic life of an enemy state.

Reviewing the history of capture, estimating the value of existing legal limitations upon it, regarding the nature of foreign trade, recognizing the varying interests of states, estimating the effectiveness of maritime operations against commerce in the present war, one is inclined to ask whether the Declaration of Paris did not grant a degree of immunity greater than the spirit and conditions of the period justified. Assuredly certain of the means which have been taken to evade its rules have been defensible in reason to an extent that has baffled the efforts directed toward maintaining them in effectiveness. It is this consideration that deprives the situation of any discouraging aspect from the standpoint of international law. That one result of

the tendency toward an adaptation of the rules of warfare to changed conditions has been that the trend today appears to be away from the realization of immunity of private property from capture at sea is a consideration of minor importance if it means that belligerents have not been deprived, on purely technical grounds, of rights which they may fairly claim. Assuming that neutral interests also must receive consideration, and granting that they have not been adequately protected, it is inevitable that, while resort to war continues, accepted rules will have to be revised in the light of circumstances unforeseen at the time of their formulation. The principle of immunity is far from being realized in practice today, not because belligerents choose to disregard the rules of international law, but because under present conditions the destruction of an enemy's trade in its entirety appears to constitute an object of warfare of the first importance. So long as that attitude persists there will be necessary a work of reconstruction which will select and legalize those extensions of practice which are consistent with the progress of international law and will reject other extensions the operation of which is contrary to progress.

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[1] The following abbreviations have been used throughout this study:
A. J. I. L., for *American Journal of International Law;*
R. D. I. for *Revue de Droit International et de Legislation Comparée;*
R. G. D. I. P. for *Revue Générale de Droit International Public.*

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